Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

Paul Cole,

Petitioner,

v.

Builders Square and Cuprum, S.A. de C.V.,

Respondent.

On Petition for A Writ of Certiorari
to The United States Court of Appeals
for The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The State of Oregon has defined the evidence sufficient to raise a jury question on state claim for punitive damages as "any evidence." If the claim is removed to federal court, however, that evidence is no longer sufficient. To establish a *prima facie* case in federal court, the same claim requires "clear and convincing" evidence.

The question presented is:

Whether a federal court sitting in diversity should follow the state rule defining the evidence sufficient to raise a jury question as to whether the state-created claim was established.

PARTIES TO THE PROCEEDING

Petitioner Paul Cole is an individual and was the plaintiff and appellant in the proceedings below.

Respondent Cuprum is a Mexican company and was the Defendant and the Respondent below.

Builders Square was a defendant in the District Court but shortly after service declared bankruptcy and was dismissed from the proceedings.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Ninth Circuit (App. 1a-6a) is not reported in the Federal Reporter but can be found at 48 Fed. Appx. 684 (2002). The opinions of the District Court (App. 7a-34a) are unreported. The order of the Ninth Circuit denying the petition for rehearing (App. 35a) is unreported.

JURISDICTION

The judgement of the Ninth Circuit was entered on October 11, 2002. A timely petition for rehearing was denied on November 14, 2002. This jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent statutes and constitutional provisions are reproduced in the Appendix. The United States constitutional provision involved is the Seventh Amendment (App. 32a). The Oregon constitutional provisions involved are Article I §17 and Amended Article VII §3 (App. 32a). The federal statutes and rules involved are 28 U.S.C. § 2072 (App. 33a.) and Fed. Civ. R. Proc. 56 (App. 34a). The Oregon statutes involved are O.R.S. 18.537 (1) (App. 35a) and 18.540 (1) (App. 36a).

STATEMENT OF THE CASE

This product liability action presents an *Erie* choice of law question as to whether, in opposing a summary judgment motion, plaintiffs seeking punitive damages must meet the more onerous evidentiary burden of persuasion under federal law, or the less stringent evidentiary burden under state law.

The action was originally filed in state court then removed to federal court. The district court's exercise of jurisdiction is based solely upon 28 U.S.C. § 1332, diversity of citizenship.

The case arises out of injuries which petitioner Cole

sustained when he attempted to climb down from a rooftop using a Model 534 extension ladder designed and manufactured by respondent Cuprum Ladder. When Cole stepped onto the ladder, its "rung lock" failed. The ladder "telescoped" downward, and Cole was severely injured when he fell and "impaled himself" on a nearby garden post.

Cuprum designed and began manufacturing the rung lock for its Model 534 extension ladder in 1989.[1] Even though the company routinely purges records of claims against it, Cole uncovered three claims that resulted in lawsuits – one brought in 1992 ("*Watkins*")[2] another brought in 1994 ("*Bazan*")[3], and yet another brought in 1996 ("*Jehnsen*").[4] Each suit alleged serious injuries caused by the very same design defect that caused Cole's ladder to fail.

Despite all these claims, Cuprum failed to take any action to correct its rung lock design or to warn consumers of the danger. Instead it continued to manufacture and sell ladders it knew were defective.

In his suit against Cuprum, Cole sought punitive damages to deter Cuprum and other manufacturers from ignoring such hazards. Cuprum moved for, and obtained, a summary

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[1] ER33 at 236.

[2] *Watkins v. Cuprum International, Inc. and Alamo Iron Works, Inc.*, Brazos County District Court Cause No. 36.987-85 (Texas 1992). ER6 at 65-66.

[3] *Domingo Bazan v. Cuprum, S.A. DE C.V., Davidson Ladders, Inc. and Builders Square, Inc.*, Harris County District Court Cause No. 96-32221 (Texas 1994). ER6 at 65-66.

[4] *Jehnsen v. Builders Square, Inc., Davidson Ladders, Inc. and Cuprum, S.A. DE C.V.*, Bay County Circuit Court Case No. 96-3148-NP-B (Michigan 1996). ER6 at 65-66.

judgment of dismissal against Cole's punitive damage claim.[5] It is that dismissal that gives rise to the instant petition.

Cole provides the following background.

A. Cole's *Prima Facie* Evidence

Under Oregon law, to establish a *prima facie* case for punitive damages in a product liability case, Cole had to establish the following elements:

(1) that Cuprum's product was unreasonably dangerous, and;

(2) that it either knew, or should have known, of the product's dangerous propensity.[6]

To meet the first element – unreasonable danger – Cole presented the sworn opinions of three licensed engineers, each attesting that Cuprum's rung lock design was both defective and unreasonably dangerous.[7]

To meet the second element – notice of the danger – Cole presented evidence of the three prior above-referenced lawsuits.

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[5] ER3 at 5.

[6] *See Oberg v. Honda Motor Co.*, 320 Or. 544, 553, 888 P.2d 8 (1995). *Oberg* held that evidence that the manufacturer had prior notice that its product was likely to cause serious personal injury or death was sufficient to support an award of punitive damages:

> "Evidence was presented that defendants actually knew, or should have known, for many years before developing the ATV model that injured plaintiff, that their ATVs were highly likely to cause serious personal injury or death."

See also ORS 18.537.

[7] Excerpts from engineers Williams, Paul, and Cronrath's Rule 26(b) disclosures. ER6 at 42-44, 45-47, and 48-50, respectfully.

Each named Cuprum as a defendant; each involved the same model ladder and defective rung lock; and each alleged serious injuries resulting from the same false locking defect.

B. The Magistrate Correctly Framed the Issue as Turning on Prior Notice

The Magistrate who heard the motion,[8] properly acknowledged that for purposes of summary judgment she would accept as true the opinions of Cole's three experts attesting to the ladder's dangerousness.[9] She then properly framed the issue under Oregon law as turning on whether Cuprum had prior notice of "problems with the Model 534 rung locks."[10]

C. The Magistrate Erroneously Applied a "Clear and Convincing" Standard Instead of Oregon's "Any Evidence" Standard

In determining the sufficiency of the prior notice evidence, the Magistrate applied the more burdensome federal standard instead of Oregon's less stringent standard. The two standards are significantly different.

Under the federal standard, in ruling on a motion for summary judgment, the judge must evaluate the evidence presented through the "prism of the substantive evidentiary burden,"[11] which for an Oregon punitive damage claim is "clear

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[8] The district court trial judge adopted the reasoning of the Magistrate with little discussion. App. 29a-30a.

[9] App. 14a.

[10] App. 17a.

[11] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

and convincing."[12] In other words, under the federal standard, the appropriate summary judgment question is whether a reasonable jury could find that Cole presented "clear and convincing" evidence that Cuprum had prior notice of the ladder's problems.[13]

In stark contrast, Oregon law has defined the evidence sufficient to raise a jury question as to a punitive damage claim as "any evidence." Moreover, that standard applies whenever the sufficiency of a *prima facie* case is called into question, such as in a directed verdict motion or a summary judgment motion.[14] This includes claims that require a heightened burden of proof to recover, such as a punitive damage claim where the burden of proof required is clear and convincing evidence. *Bolt v. Influence, Inc.*, 333 Or. 572, 577, 43 P.3d 425 (2002). In fact, the Oregon Supreme Court has stated that " the 'clear and convincing' burden of proof ..., which refers to the ultimate burden of proof that a plaintiff must meet to recover punitive damages, has no relation to the burden associated with the "directed verdict" standard used to review the sufficiency of evidence ...." A plaintiff satisfies the latter by producing some evidence in support of a *prima facie* case." *Id.* at 579-80.[15]

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[12] ORS 18.537(1).

[13] *Anderson*, 477 U.S. at 256-55.

[14] *Jones v. General Motors Corp.*, 325 Or. 404, 420, 939 P.2d 608 (1997) (Court held that the summary judgment standard mirrors the directed verdict standard, which is "any evidence.").

[15] Although the issue in *Bolt v. Influence, Inc.*, 333 Or. 572, 577, 43 P.3d 425 (2002), was whether the plaintiff was entitled to amend his complaint to add a punitive damage claim, in order to do so under Oregon law, the plaintiff must submit evidence necessary to establish a punitive damage *prima facie* case.

Thus under Oregon law, if Cole presents "any evidence" that Cuprum had prior notice of the ladder's problems, then he creates a triable issue as to punitive damages. *Id.* at 579.

But because the Magistrate used the federal standard, she had to decide whether Cole produced "clear and convincing" prior notice evidence. The burden of persuasion, by definition, "is the duty of establishing the truth of a given proposition or issue by such a *quantum* of evidence as the law demands."[16] Thus viewing the evidence presented through the "prism of the substantive evidentiary burden" required her to consider and *weigh* evidence contradicting what Cole had presented in support of his *prima facie* case[17] – an approach that Oregon state law specifically rejects.

This was apparent when the Magistrate considered Cole's evidence of the 1992 products liability suit that Watkins filed against Cuprum to show that the company had prior notice of its ladder's dangerous propensities. First, the Magistrate considered testimony from Cuprum's claims handler, Mr. Cooke, that contradicted Coles' evidence. Mr. Cooke testified that the jury returned a defense verdict in *Watkins* and that the reason it did so was because the jury found the lock did not malfunction. She then found his testimony more persuasive than Cole's evidence. Thus she concluded that the *Watkins*' suit could not place Cuprum on notice of the problem:

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[16] *Bolt v. Influence, Inc.*, 333 Or 579.

[17] The trial judge can only consider evidence that could be a complete defense, such as an exemption or immunity:

> "[A] court considers such evidence as it would in ruling on a motion for a directed verdict – that is, to the extent that it establishes that a defendant is immune or enjoys some other exemption or complete defense to a punitive damages award." *Bolt,* 333 Or. at 582.

> *Watkins* resulted in a jury verdict for Cuprum. Cooke's testimony reveals his corresponding reasonable belief that the jury had completely rejected the plaintiff's allegation that the ladder had mis-locked. *See* Cooke Depo, p. 89 ("it was proved that it was not a telescoping case"). Thus, absent any contrary evidence, Cole cannot rely on *Watkins* to show that Cuprum had notice of a design defect in the rung locks of the model 534 ladder.[18]

In a similar manner, the Magistrate held that the other two lawsuits, *Bazan* and *Jehnsen*, also failed to impart any prior notice to Cuprum. In effect, she ruled that for a prior lawsuit to constitute "clear and convincing" evidence of notice, evidence of a claim alone is not enough, the claim must have resulted in a finding that the alleged product was, in fact, defective:

> [T]he two lawsuits filed in 1996, *Bazan* and *Jehnsen*, though factually very similar to the present suit, provide little hard evidence of culpable conduct. A lawsuit is merely a claim which may or may not have merit. This court has no information as to the outcome in those cases. Did the case go to trial, and, if so, who won? Did Cuprum believe that the lawsuits were meritless, yet settle them to avoid the difficulties and expense of litigation? Without more, this court is hard-pressed to consider the two lawsuits as evidence of Cuprum's knowledge of a defect.[19]

Under Oregon law, imposing such a heavy burden and considering opposing evidence would not have been appropriate. The Oregon Supreme Court has explained that

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[18] App. 23a - 24a.

[19] App. 24a.

> . . . in deciding whether to submit case to jury, 'we are unconcerned with the quantum of evidence. Our concern is only with the existence of evidence which, if accepted as being true by the trier of fact, would establish the fact in question.

Bolt, 333 Or. at 580.

Oregon law recognizes that lawsuit complaints alleging a dangerous condition or defect unquestionably serves as notice of the problem.[20] Under Oregon law, evidence of the three lawsuits, would have established that Cuprum had prior notice of the defect.

Despite all of Cole's notice evidence, the Magistrate's application of the federal standard resulted in a dismissal of Cole's punitive damages claim:

> Here, no reasonable jury could find that Cuprum has had notice, or should have had notice, of any defect in the rung lock mechanism of the Model 534 extension ladder.[21]

Had Oregon's sufficiency of evidence standard been used, the outcome surely would have been different.

D. The Ninth Circuit's Opinion

The Ninth Circuit affirmed the district court's use of the federal "clear and convincing" standard for the Oregon claim:

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[20] *See, e.g., Oberg v. Honda Motor Co.*, 320 Or. 544, 553, 888 P.2d 8 (1995); *Waddill v. Anchor Hocking, Inc.*, 149 Or. App. 464, 468, 944 P.2d 957 (1997); *Lakin v. Senco Products,* 144 Or. App. 52, 61, 62-63, 925 P.2d 107 (1996), *aff'd.*, 329 Or. 62, 987 P.2d 463 (court adopted reasons of lower court for affirming admission of prior acts. *Id.* at 84), *mod. on recons. on unrelated grounds*, 329 Or. 369, 987 P.2d 476 (1999).

[21] App. 27a.

> Federal law applies to the question of the quantum of proof necessary to sustain a cause of action. The federal standard requires the court to view the evidence presented through the prism of the substantive evidentiary burden, which is precisely what the district court did. Because we conclude that the district court properly applied the relevant standard, we affirm on this issue.[22]

REASONS FOR GRANTING THE PETITION

A. Introduction

There are three reasons why this court should grant the petition.

1. To resolve a conflict between state and federal law

The District Court and Ninth Circuit's use of the "clear and convincing" evidentiary standard conflicts with Oregon's substantive law. The latter provides that "any evidence" is sufficient to create a jury question. *Erie* and *Byrd* both teach that removing a case to federal court involves exchanging courtrooms, not laws. Thus, a plaintiff's *prima facie* case should not disappear merely because it is removed to federal court. To allow two different standards to apply to the same claim within the State, however, will result in just that. This inequitable administration of laws will surely encourage parties to forum shop, a practice that this Court has long sought to avoid.

2. To uphold this court's precedent

The Ninth Circuit's ruling that "[f]ederal law applies to the 'question of the quantum of proof necessary to sustain a cause

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[22] App. 3a.

of action'"[23] conflicts with this Court's decisions in *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940) and *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958). In *Byrd,* this Court relied upon *Stoner* for the proposition "that the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established." *Byrd* at 540, n.15.

3. To resolve conflict and doubt among the circuits

Although this Court's opinion in *Byrd* and *Stoner* indicate that the federal court should follow the state law defining the evidence sufficient to raise a jury question, the federal courts of appeals are divided. Some hold that the sufficiency of evidence is a matter of state law. Some hold it is a matter of federal law. And some declare the issue is still unresolved. The instant case is an excellent opportunity for the Court to reaffirm its holding in *Byrd* – that the amount of evidence sufficient to create a jury issue on a state claim in federal court is "intended to be bound up with the definition of the rights and obligations of the parties" which make it "clearly substantive" and applicable in federal court. *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525, 535-36 (1958).

B. Argument in Support of Granting Petition

Erie holds that "except in matters governed by the Federal Constitution or by Acts of Congress," the Rules of Decision Act, 28 U.S.C. § 1652,[24] requires federal courts sitting in

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[23] App. 3a.

[24] The Rules of Decision Act, now contained in 28 U.S.C. § 1652, reads:

> "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil

diversity to apply state substantive law and federal procedural law. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). "In essence, the intent of *Erie* was to insure that, in all cases where a federal court is exercising jurisdiction solely because of [diversity], the outcome of the litigation in the federal court should be substantially the same ... as it would be if tried in a State court." *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). The twin aims of *Erie* are to avoid the "inequitable administration of the laws" and discourage "forum shopping." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965).

Whether the state law is "substantive" or "procedural" is not always readily apparent, however. In cases where it is not clear, the state law will be considered "substantive" if its application could affect the outcome of the litigation to such a degree that litigants will take that into account when choosing the forum – state or federal – in which to litigate. *Guaranty Trust Co.*, 326 U.S. 99 (1945).

State substantive laws that conflict with the Seventh Amendment must be examined in light of the competing federal interests. The Seventh Amendment governs proceedings in federal court, and includes such federal interests as the right to trial by jury. If the state law conflicts with the Seventh Amendment, the state law will apply in federal court only if the state interest outweighs the countervailing federal interests. *Byrd v. Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525, 537 (1958).

The *Erie* Doctrine does not apply, however, to Federal Rules of Procedure that "control the issue'" because they are promulgated by the Supreme Court under an Act of Congress, the Rules Enabling Act, 28 U.S.C. § 2072. The Act's only

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actions in the courts of the United States, in cases where they apply."

limitation is that the federal rule "shall not abridge, enlarge or modify any substantive right." *Id.* Saving that limitation, if the federal rule is "'sufficiently broad' to cause a 'direct collision' with the state law or, implicitly, to 'control the issue' before the court, thereby leaving no room for the operation of that law," the federal rule controls. *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 4-5 (1987).

Thus, whether a federal court sitting in diversity should apply the Oregon "any evidence" standard or the federal "clear and convincing" standard involves a three-step inquiry. The first step is to determine whether Rule 56 defines the evidentiary burden required to establish a *prima facie* case for state claims, and if so, does it require the *prima facie* burden vary in accordance with the burden of proof required to prevail on the particular claim at issue. If the answers to both are "yes," then Rule 56 controls and the lower courts properly applied the federal "clear and convincing" standard in this case. However, if Rule 56 does not define the *prima facie* burden for state claims, then the second step is to determine whether Oregon's definition of a *prima facie* case is considered "substantive" law. If it is considered "procedural," then the federal standard applies. However, if it is considered "substantive," then the third step is to determine whether applying Oregon's definition of a *prima facie* case conflicts with the federal interests contained in the Seventh Amendment, and if so, does Oregon's interest outweigh the countervailing federal interests. If it does, then Oregon's "any evidence" definition of a *prima facie* case applies in federal court.

1. Rule 56 does not pre-empt Oregon's less stringent sufficiency of evidence standard

a. Federal rules are construed narrowly so as to avoid conflict with state interests

Given the state interests recognized in *Erie* and the Rules

of Decision Act, this Court has long held that federal statutes and federal rules should be construed, if at all possible, to avoid a conflict with state interests.[25] This practice is in keeping with the federalist principle that Acts of Congress are to be construed "in light of the presumption against the pre-emption of state police power regulations." *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 518 (1992); and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

Moreover, in order for the political safeguards of federalism to function effectively,[26] the States must be put on notice about how much of their law is being removed by Congress. "Mere silence ... cannot suffice to establish a clear and manifest purpose to pre-empt local authority." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 607 (1991).[27]

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[25] *See, e.g., Hanna v. Plumer*, 380 U.S. 460, 470 (1965) (finding an "unavoidable" clash given federal rule of "unmistakable clarity"); *Walker v. Armco Steel Corp.*, 446 U.S. 740, 750 (1980) (avoiding construction that, under Fed. R. Civ. P. 3, filing of complaint tolls statute of limitations for state-law actions, where state law requires effectuation of service); and comparing *West v. Conrail*, 481 U.S. 35, 39 & n.4 (1987) (holding that under Fed. R. Civ. P. 3, filing of complaint tolls statute of limitations for federal-law causes of action, and explaining the opposite result in *Walker* as flowing from "respect for the State's substantive decision that actual service is a component of the policies underlying the statute of limitations") (citing *Walker*, 446 U.S. at 752); *see also Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 200-02 (1956) (construing federal arbitration statute narrowly to avoid conflict with state law); *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943) (construing Fed. R. Civ. P. 8(c) narrowly to avoid conflict with state law in diversity case).

[26] *See Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) and *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

[27] Congress was so meticulous in safeguarding federalism values that "[a] study of the enacted Rules reveals little remaining that could plausibly have been attacked, were it subject to the Enabling Act's limitation, as modifying

If the federal rule's language itself does not specifically address the state matter, but is merely judicially interpreted to do so, then the judge-made rule does not enjoy the same status as a congressional enactment under the Federal Rules Enabling Act and *Hanna*. *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. at 27 n.6 (stating that "if application of federal judge-made law would disserve [Erie's] two policies, the district court should apply state law"). *See also Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996) (stating that the "shock the conscience" standard used for Rule 59 motions was a "judge-made formulation in responding to excessiveness attacks on jury verdicts" (*id.* at 422); thus, whether New York State rule applied was not governed by the Rules Enabling Act but by the principles of *Erie*. *Id.* at 426-29.).

In summary, when a rule governing the administration of the federal courts is not expressly prescribed by one of the Federal Rules of Civil Procedure, a Congressional Act, or the Constitution – but is instead a judge-made "procedural" law – a court is not bound by *Hanna*. The Court must resort to the *Erie* doctrine to determine whether the state law applies in federal court.

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state substantive rights in diversity cases," confirming that Congress was "deeply concerned with preventing the undercutting of state substantive policy." Olin G. Wellborn, *The Federal Rules of Evidence and the Application of State Law in the Federal Courts*, 55 Tex. L. Rev. 371 at 401-02 & n.177 (1977). That inference follows especially in the context of this products liability suit, for Congress has traditionally been extremely reluctant to interfere with state law in tort cases. *See, e.g., Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984); see generally Michael H. Gottesman, *Draining the Dismal Swamp: The Case for Federal Choice of Law Statutes*, 80 Georgetown L.J. 1, 30-31 (1991).

b. Rule 56 neither defines the evidentiary burden required to establish a *prima facie* case for a state claim, nor incorporates the claim's required burden of persuasion

Here, the language of Rule 56 does not speak to the evidentiary burden required to establish a *prima facie* case, let alone incorporate any applicable burden of persuasion. Rather, its sole criteria for granting a summary judgment motion is that there is no "genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).[28]

Although Rule 56 does not address the matter, in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), this Court created a judge-made rule requiring a trial judge to consider the ultimate burden of persuasion, such as the "clear and convincing" standard, when evaluating the evidence for a motion for summary judgment.

Anderson, however, is clearly inapposite here. First, it presented the narrow issue of "whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies." *Id.* at 244. Thus, there were constitutional implications in *Anderson* not present in this case.[29]

More importantly, in *Anderson* there was no countervailing

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[28] App. 34a.

[29] When a matter is one of public concern, the First Amendment affords special protections and a heightened burden applies. *See, e.g., Philadelphia Newspapers, Inc. v. Hepp*, 475 U.S. 767 (1986).

state law that might apply, as there is here.[30] *Erie*, in short, was not an issue in *Anderson*.

In summary, because the language of Rule 56 does not define the evidentiary burden required to sustain a *prima facie* case for a state claim, nor does it incorporate any applicable burden of persuasion, the inquiry must advance to the next step: determining whether Oregon's sufficiency of evidence definition constitutes substantive law.

2. Oregon's rule defining the evidence sufficient to raise a jury question for establishing a product liability punitive damage claim is "substantive"

Once a court determines that the state law does not conflict with a Federal Rule of Civil Procedure, it must then determine whether the principles underlying the *Erie* doctrine require enforcement of the state law in federal court.

a. State laws or rules that define the elements of a claim and establish burdens of proof are "clearly substantive"

Federal courts sitting in diversity must enforce state rules that are clearly substantive. This Court defined substantive rules as those that are "intended to be bound up with the definition of the rights and obligations of the parties." *Byrd*, 356 U.S. at 536.

State rules that define the elements of a cause of action, affirmative defenses, presumptions, and burdens of proof, together with rules that create or preclude liability, are so obviously substantive that their application in diversity actions

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[30] Many have questioned *Anderson's* wisdom of incorporating a heightened burden of persuasion into determining whether evidence is sufficient as a matter of law. For further discussion see note 40 *infra*.

is required. *See, e.g.,Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 20-21 (2000) ("[W]e have long held the burden of proof to be a 'substantive' aspect of a claim."); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 446-47 (1959) (federal court must apply state law presumptions and burdens of proof).

The Court's rationale for having "long held the burden of proof to be a 'substantive' aspect of a claim [is that] the burden of proof is an essential element of the claim itself; one who asserts a claim is entitled to the burden of proof that normally comes with it." *Raleigh*, 530 U.S. at 20-21 (2000). *Accord American Dredging Co. v. Miller*, 510 U.S. 443, 454 (1994) ("[T]he right of the plaintiff to be free of the burden of proof 'inhered in his cause of action,' was a part of the very substance of his claim and cannot be considered a mere incident of a form of procedure.").

The evidence necessary to establish a claim is also essential to the claim itself, and a "substantive" aspect of the claim. *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940).[31] Similarly, state rules defining that quantum of evidence are considered "substantive." *Id.*

Thus if Oregon defines the amount of evidence sufficient to create a jury question on a punitive damage claim as "any evidence," then that standard should apply in federal court.

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[31] In *Byrd*, the Court interpreted *Stoner* as having held "that the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established." *Byrd*, 356 U.S. at 540 n.15.

b. Even if Oregon's rule defining the evidence sufficient to raise a jury question for punitive damages is not "clearly substantive," the law meets the *Erie* definition of "substantive"

Even if Oregon's definition of a punitive damage *prima facie* case is not "clearly substantive,"[32] it still meets the *Erie* definition of "substantive."

(1). The *Erie* test

In those instances where a state rule is not "clearly substantive," *Erie* requires that the court ask whether non-application of the rule will change the litigants' behavior or the outcome of the case, as this Court stated in *Guaranty*:

> . . . the intent of *Erie* was to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.

326 U.S. at 109.

As noted, the twin aims of *Erie* are to avoid the inequitable administration of the laws and the inevitable forum shopping that will follow.[33] If non-application of the state rule encourages *either* of *Erie's* tests of substantiveness, then the

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[32] A rule or law defining the sufficiency of evidence could be considered both "procedural" and "substantive," – "procedural" in that it assigns decision making authority to the jury – "substantive" in that it defines the evidence sufficient to establish the claim.

[33] *Hanna*, 380 U.S. at 468.

state law applies. *Gasperini*, 518 U.S. at 428 (quoting *Hanna*, 380 U.S. at 468). This is true even if the state law appears on its face to be procedural.

As explained above, procedural rules concerning the burden of persuasion are so intertwined with the definition of the substantive right, that *Erie* requires that they apply in federal court. For the same reason, state laws that define the sufficiency of evidence to establish a state claim should apply in federal court, even if the issue arises in the context of a motion that can be characterized as purely "procedural." Indeed, as noted above, this Court has said as much in *Byrd*, 356 U.S. at 540 n.15.

The federal circuits, however, are divided on whether they should follow the state law defining the evidence sufficient to raise a jury question. Some hold that the sufficiency of evidence is a matter of state law.[34] Some hold it is a matter of federal law.[35] And some declare the issue is still unresolved.[36]

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[34] The Sixth and Eighth Circuits apply the state standard to the sufficiency of evidence in determining directed verdict motions: *See, e.g., American & Foreign Ins. Co. v. General Electric Co.*, 45 F.3d 135 (6th Cir. 1995); *City Nat'l Bank v. Unique Structures, Inc.*, 929 F.2d 1308, 1314 (8th Cir. 1991).

[35] The federal standard is applied in directed verdict motions in the Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits. *See, e.g., Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 99 (4th Cir. 1991); *Gross v. Black & Decker (U.S.), Inc.*, 695 F.2d 858, 864 (5th Cir. 1983); *Miller v. Republic Nat'l Life Ins. Co.*, 789 F.2d 1336, 1340 (9th Cir. 1986); *Zimmerman v. First Fed. Sav. & Loan Ass'n.*, 848 F.2d 1047, 1051 (10th Cir. 1988); *Jones v. Miles Labs.*, 887 F.2d 1576, 1578 (11th Cir. 1989).

[36] The Second Circuit has not yet resolved the question of whether a court sitting in diversity should evaluate challenges to the sufficiency of evidence under the standard of review prescribed by federal or state law. *See, e.g., Brady v. Chem. Constr. Corp.*, 740 F.2d 195, 202 n.7 (2d Cir. 1984).

Moreover, despite this Court's holding that the Rule 56 "standard" and "inquiry" "mirrors" that of a Rule 50 motion, and the primary difference between the two is timing, some circuits apply the federal standard for one and a state standard for the other.[37] For example, in the Sixth Circuit, the federal standard applies during pre-trial phases of litigation, such as in Rule 56 motions, but the state standard applies during the trial phase, such as in Rule 50 motions, and the post-trial phase, such as in Rule 59 motions.[38]

This Court's decisions in *Stoner* and *Byrd* should have all but laid this conflict to rest. In *Stoner,* this Court declared that when the state actually defines the quantum of evidence needed to present a jury issue on a cause of action the state definition applies. *Stoner v. New York Life Insurance Co.*, 311 U.S. 464 (1940). And later, in *Byrd* this Court endorsed *Stoner* for the proposition that "the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established." *Id.* at 540 n.15.

Thus, applying *Byrd* and *Stoner* here, the federal court is required to apply Oregon law because Oregon *has* defined the amount of evidence sufficient to raise a jury issue as to punitive damages.

Recently this Court affirmed *Byrd's*, and implicitly *Stoner's*, continued vitality in *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996). There it held that, at

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[37] "[The summary judgment] standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a)." *Anderson,* 477 U.S. at 259. "[And the] summary judgment inquiry 'mirrors' that which applies in the context of a motion for directed verdict under Federal Rule of Civil Procedure 50(a)." *Id.*

[38] *See, e.g., J.C. Wyckoff & Assoc. v. Standard Fire Ins. Co.,* 936 F.2d 1474, 1482 (6th Cir. 1991).

least for federal actions brought under New York law, state law applies in determining the sufficiency of evidence under a Rule 59 motion brought at the trial level. *Id.* at 426. The instant case gives the Court an excellent opportunity to decide the issue squarely and directly so as to eliminate the divergent approaches taken by the various circuits.

(2). Oregon's law satisfies the *Erie* substantive law test

Here, the failure to follow Oregon's law at the federal level will result in fulfilling *Erie's* twin fears – the inequitable administration of laws and forum shopping.

If Oregon's law is not followed at the federal level, Oregon citizens and companies will be discriminated against. Oregon citizens and companies cannot remove state claims to federal court because they lack diversity. Thus, they are subject to liability for punitive damages so long as the plaintiff produces "any evidence" to support a *prima facie* case. On the other hand, because diversity exists for foreign corporations and non-citizens, they *are* able to remove state claims to federal court. Once there, they acquire the advantage, unavailable to Oregon citizens and companies in state court, of requiring the plaintiff to establish his or her *prima facie* case by the more onerous "clear and convincing" evidence standard.

The same rationale applies to injured plaintiffs. Those who have the added misfortune of being injured by an out-of-state citizen or foreign company have less of a chance of recovering than those who have been injured by an Oregon citizen or company because of the more onerous federal burden of establishing a State claim.

Applying a federal sufficiency standard under Rule 56 that is more stringent than that the under Oregon law will create a systematic bias against Oregon plaintiffs in federal court. After

all, it is plaintiffs, not defendants, who most often bear the burden of presenting a *prima facie* case, and with that, the extraordinary and heightened burdens of proofs, such as the "clear and convincing" standard.

In short, *Erie* requires that Oregon's sufficiency of evidence rule receives the benefit of any doubt about its "procedural" versus "substantive" character. Even if it appears to be both, under *Erie's* test it should be considered "substantive."

3. Applying Oregon's law does not run contrary to the Federal interests contained in the Seventh Amendment.

Having determined that Oregon's law is "substantive," the final question is whether the federal interests contained in the Seventh Amendment nevertheless require application of the federal standard.

a. There is little if any countervailing federal interest that would prevent a federal court from applying the Oregon sufficiency standard

This Court held in *Byrd*, that even if a state law is deemed "substantive," federal law may still apply if the federal interests outweigh the state interests. The countervailing federal interests that this Court had in mind was the federal interest addressed, "if not commanded," by the Seventh Amendment, which governs proceedings in federal court:

> An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence – if not the command – of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury.

Byrd, 356 U.S. at 537.

The Seventh Amendment reads:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const., Amend. 7.

Byrd involved the Seventh Amendment's first clause – the "trial by jury" clause. *Byrd* was a personal injury action where the defendant asserted that the plaintiff was barred from recovering because he was considered an employee under the state's Workers Compensation Act. Were the case tried in state court, in accordance with the state law, the pivotal issues of fact would have been tried to a judge. But the *Byrd* Court held that failing to allow the jury to act as a fact-finder in federal court infringed on the Seventh Amendment's right to "trial by jury" by removing from the trial judge the power to submit the claim to the jury. Thus, despite a contrary state practice, the Seventh Amendment demanded that the plaintiff be given a jury trial in federal court.

This Court's ruling in *Byrd* does not, however, call for application of the federal approach in the instant case. *Byrd* specifically held that "defining the evidence sufficient to raise a jury question whether the state-created right was established" did not infringe upon Seventh Amendment.[39] It reasoned that such evidentiary standards do not remove from a federal trial judge the power to submit matters to a jury – the standards only aid the jury process by giving the judge appropriate guidelines

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[39] *Byrd*, 356 U.S. at 540 n. 15.

in making his or her jury-submission decision. Referring to the Court's decision in *Stoner v. New York Life Insurance Co.*, the *Byrd* Court stated:

> It was there held that the federal court should follow the state rule defining the evidence sufficient to raise a jury question whether the state-created right was established. But the state rule did not have the effect of nullifying the function of the federal judge to control a jury submission ....

Id. at 540 n.15.

As a practical matter, allowing a trial judge to incorporate Oregon's sufficiency of evidence standard will cause very little disruption of the federal civil jury trial process. The trial judge merely uses Oregon's "any evidence" standard in a summary judgment proceeding as opposed to a "clear and convincing" standard. In most cases the trial judge, having practiced in State court, is familiar with the State standard. And almost certainly, it is easier to apply in determining the sufficiency of evidence than the nebulous "clear and convincing" standard.[40]

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[40] Little guidance is given to the trial courts on how to apply the "clear and convincing" evidence standard to determine the sufficiency of evidence. *Anderson*, 477 U.S. 242(1986), instructs trial judges to "consider" applicable evidentiary standards, but the Court did not explain what that means:

> [H]ow does a judge assess how one-sided evidence is, or what a 'fair minded' jury could 'reasonably' decide? The Court provides conflicting clues to these mysteries, which I fear can lead only to increased confusion in the district and appellate courts.

Id. at 265 (Brennan, J., dissenting).

The difference between the evidence sufficient to submit a claim to the jury under the preponderance of the evidence quantum of proof but not

Federal courts can surely give effect to the substantive thrust of Oregon's definition of a *prima facie* case without any "untoward alteration of the federal scheme for the trial and decision of civil cases."[41]

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under the clear and convincing evidence quantum is difficult to imagine without weighing the evidence. As Justice Brennan noted:

> I simply cannot square the direction that the judge "is not himself to weigh the evidence" with the direction that the judge must also bear in mind the "quantum" of proof required and consider whether the evidence is of sufficient "caliber or quantity" to meet that "quantum." I would have thought that a determination of the "caliber and quantity," *i.e.*, the importance and value, of the evidence in light of the "quantum," *i.e.*, amount "required," could *only* be performed by weighing the evidence.

Id. at 266. (Brennan, J., dissenting) (emphasis in original.)

Referring to the trial judges who must apply the clear and convincing standard at the sufficiency of evidence level, Justice Brennan remarked:

> "[T]he mess we make is not, at least in the first instance, our own to deal with; it is the district courts and courts of appeal that must struggle to clean up after us."

Id. at 268. (Brennan, J., dissenting).

Justice Brennan was not alone. Justice Rhenquist also wrote a persuasive dissent, joined by Chief Justice Burger. In addition, Justice Scalia, who wrote the underlying opinion at the Court of Appeals, made similar observations. Several commentators also agree that trial judges cannot determine the "caliber and quality" of evidence without weighing the evidence. *See also* Samuel Issacharoff & George Lowenstein, *Second Thoughts About Summary Judgment*, 100 Yale L.J. 73, 85 (1990); Linda S. Mullenix, *Summary Judgment: Taming the Beast of Burdens*, 10 Am.J. Trial Advoc. 433, 462 (1987); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court's Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 Ohio St. L.J. 95, 115-116 (1988).

[41] In *Gasperini*, Justice Ginsberg phrased the federal interest question as follows: "The dispositive question, therefore, is whether federal courts can

In summary, there is little if any countervailing federal interest that would displace or supersede the State interest.

b. The State of Oregon has a significant interest in applying her law

On the other hand, Oregon's interest in having her law applied is significant and compelling. *Byrd* held that great weight should be given to those state interests that are "bound up" in the "definition of state-created rights and obligations." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 535 (1958). Here, defining what evidence suffices to create a jury issue on a state-created cause of action is, by definition, "bound up" in the "definition of state-created rights and obligations." A cause of action's elements are not abstractions. Rather, they are defined by – and barely distinguishable from – the evidence considered sufficient to prove them.

Indeed, to hold otherwise would seemingly run contrary to Fed. R. Evid. 302 which dictates that federal courts apply state law evidentiary presumptions to state claims:

> In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which state law supplies the rule of decision is determined in accordance with state law.

There is little difference between what evidence establishes an element of a claim and that which establishes the entire claim. If federal courts must follow Oregon law for the former, they should also follow Oregon law for the latter.

More importantly, the State of Oregon has historically

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give effect to the substantive thrust of [the state law] without untoward alteration of the federal scheme for the trial and decision of civil cases." *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426 (1996).

placed great importance on the jury's right to act as the final arbiter on all issues of fact. *See* Or. Const., Article I, Section 17, Article VII (Amended) Section 3; *Van Lom v. Schneiderman*, 187 Or. 89, 93, 210 P.2d 461 (1949), *overruled in part by Oberg v. Honda Motor Co., Ltd.*, 320 Or. 544, 549, 888 P.2d 8, *cert. den.* 517 U.S. 1219 (1996). Assigning the fact-finding function as the exclusive province of the jury is at the heart of these Constitutional provisions. If Oregon holds that certain evidence establishes a *prima facie* showing and presents a fact issue for the jury, holding less would violate the right to jury trial guaranteed under the Oregon Constitution, Article I §17,[42] and the reexamination clause of the Oregon Constitution, Amended Article VII §3.[43]

Finally, unlike other states, the State of Oregon uses punitive damages as a means of policing culpable conduct, much like a fine. When a defendant is assessed punitive damages, sixty percent of the punitive damage award is owned by and paid directly to the State. ORS 18.540.

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[42] Oregon Constitution, Article I §17 provides:

> In all civil cases the right of Trial by Jury shall remain inviolate.

[43] Oregon Constitution, Amended Article VII §3 provides in relevant part:

> In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

While the present issue involves a type of pre-examination, not a reexamination of the jury's work, it should be clear that the court cannot prevent the jury from deciding a fact question on which there is evidence without violating the spirit of Amended Article VII §3 and the letter of Article I §17. *Lakin v. Senco Products, Inc.*, 329 Or. 62, 69-70, 987 P.2d 463 (1999).

Given the absence of a federal interest, and Oregon's significant state interest, Oregon's standard should apply.

CONCLUSION

In Oregon, a plaintiff's *prima facie* case does not disappear merely because a defendant removes the case to federal court. *Erie* and *Byrd* teach that we simply exchange courtrooms, not law, in deciding diversity cases.

Determining whether the plaintiff has presented sufficient evidence is in effect telling the plaintiff whether he or she has a case or not. To say a plaintiff has a case in state court but not in federal court will lead to serious inequities.

When a federal court is sitting in diversity and considering a summary judgment motion, Oregon's law defining what evidence suffices to raise a jury question on punitive damages must apply. The petition for writ of certiorari should be granted.

Respectfully Submitted,

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February 2003

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL COLE, Plaintiff-Appellant, v. BUILDERS SQUARE, INC., a Delaware corporation; CUPRUM, S.A. de C.V., Defendants-Appellees.	No. 01-35491 DC No. CV-99-00729-PA MEMORANDUM*

Appeal from the United States District Court
for the District of Oregon
Owen M. Panner, Senior District Judge, Presiding
Argued and Submitted September 9, 2002
Portland, Oregon
[Filed: October 11, 2002]

Before: GOODWIN, T.G. NELSON, and GRABER, Circuit Judges.

We reverse and remand in part, dismiss in part and affirm

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

in part.

I. Strict Liability Claims

At trial, Cole advanced two theories of strict liability: design defect and failure to warn. The district court granted judgment as a matter of law on Cole's claim of a design defect because it concluded that he had not offered evidence of a safer alternative design. Under then-existent Oregon law, the district court may have been correct. However, after the district court issued its decision, the Oregon Supreme Court rejected the idea that plaintiffs must always offer "evidence that the magnitude of the product's risk outweighs its utility, which often is demonstrated by proving that a safer design alternative was both practicable and feasible."[1] And the Oregon Supreme Court suggested that even in cases in which a jury requires evidence in order to determine the ordinary consumer's expectations, evidence other than proof that "a safer design alternative was both practicable and feasible" may suffice.[2] In light of recent precedent, we reverse and remand on this issue.

Defendant also argues that its product is not defective as a matter of law because the ladder comes with adequate warnings and instructions. Specifically, the ladder has a warning that states that all directions must be followed and one of the

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[1] *McCathern v. Toyota Motor Corp.*, 332 Or. 59, 23 P.3d 320, 331 (Or. 2001).

[2] *Id.* (stating that evidence of ordinary consumer expectations "*may* consist" of risk-utility analysis, "which often is demonstrated by proving that a safer design alternative was both practicable and feasible") (emphasis added). We do not decide whether the matter in this case was outside the realm of jurors' common experience such that additional evidence was necessary. We simply point out that, even if this matter is outside the realm of jurors' common experience, proof of a safer design alternative may not be necessary under current Oregon law.

directions instructs the reader to "securely engage ladder locks before climbing." Defendant reasons as follows: (1) Under Oregon law, a product that carries a warning that, if followed, allows it to be used safely is not defectively designed; (2) Defendant's ladder is safe if the warnings (and instructions) are followed; and, (3) therefore, the warnings render the ladder nondefective.

We reject Defendant's argument because the warnings do not address the problem about which the plaintiff complains: the appearance that the rungs are locked when they are not. A user, knowing full well that the rung locks must be securely engaged before use and attempting to ensure that they are, will not know from the warnings or the instructions on the ladder that the rung locks may appear to be locked when they are not. Thus the user will not know that more than a simple, visual inspection is necessary to ensure that the rung locks are securely engaged. The current labels and instructions thus do not necessarily satisfy the duty to warn.[3] Accordingly, we conclude that the district court erred when it granted judgment as a matter of law on this issue.

For the foregoing reasons, we reverse and remand Cole's claims of a design defect and a failure to warn.

II. Punitive Damages Claim

We affirm the district court's grant of summary judgment as to Cole's punitive damages claim. Federal law applies to the "question of the quantum of proof necessary to sustain a cause

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[3] *Cf. Schmeiser v. Trus Joist Corp.*, 273 Or. 120, 540 P.2d 998, 1005 (Or. 1975) (explaining that instructions "which merely tell how to use the product, and which do not say anything about the danger of foreseeable misuse, do not necessarily satisfy the duty to warn") (internal quotation marks and citation omitted).

of action."[4] The federal standard requires the court to "view the evidence presented through the prism of the substantive evidentiary burden,"[5] which is precisely what the district court did. Because we conclude that the district court properly applied the relevant standard, we affirm on this issue.

III. Evidentiary Rulings

Rulings on *in limine* motions "are not final appealable orders under 28 U.S.C. § 1291."[6] Thus, in order to appeal an issue on which the district court ruled *in limine,* a party must receive a final ruling on the issue. For example, if a party wishes to appeal the exclusion of evidence on which a court tentatively ruled *in limine,* the party must attempt to introduce the evidence at trial, giving the district court the opportunity to issue a final, appealable order.[7] Cole did not attempt to introduce evidence of prior similar claims at trial because he had voluntarily dismissed his negligence claim after the court's *in limine* order. Accordingly, the district court never issued a final exclusionary order and we lack jurisdiction to review the issue. Similarly, the district court never issued a final order regarding the proper measure of damages because Cole did not receive a favorable verdict. Thus, we may not review that question and dismiss the appeal as to it.

We also may not review the district court's decision to allow evidence that Cuprum had complied with OSHA and

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[4] *Safeway Stores v. Fannan,* 308 F.2d 94, 97 (9th Cir. 1962).

[5] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254 (1986).

[6] *Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1342, *as corrected by* 773 F.2d 1049 (9th Cir. 1985).

[7] *Tennison v. Circus Circus Enters., Inc.*, 244 F.3d 684, 689 (9th Cir. 2001).

ANSI standards. A party "who preemptively introduces evidence ... may not on appeal claim that the admission of such evidence was error."[8] Cole introduced evidence of the standards, presumably as part of a strategy to take the "sting" out of the evidence. Accordingly, we may not review this question and dismiss the appeal as to it.

We may review the district court's exclusion of the proffered testimony of plaintiff's expert, David Paul, because the court finalized its decision during plaintiff's presentation of his case. The district court was well within its discretion[9] in excluding Mr. Paul's testimony. Both Cole and Cuprum had designated experts who were, or who would have been, able to testify regarding the subjects of Mr. Paul's testimony. Accordingly, we affirm the district court's decision.

For the foregoing reasons, we reverse and remand in part, dismiss in part, and affirm in part.

REVERSED AND REMANDED IN PART; DISMISSED IN PART; AFFIRMED IN PART.

No costs allowed.

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[8] *Ohler v. United States*, 529 U.S. 753, 760, (2000).

[9] *See Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001) (setting forth the standard of review).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PAUL COLE, Plaintiff, v. BUILDERS SQUARE, a Delaware corporation,and CUPRUM, S.A., de C.V., Defendants.	CV-99-729-ST FINDINGS AND RECOMMENDATION

[Filed: November 9, 2000]

STEWART, Magistrate Judge:

INTRODUCTION

Plaintiff, Paul Cole ("Cole"), originally filed this action in Multnomah County Circuit Court (Case No. 9904-04724) against defendants, Builders Square, and Cuprum, S.A. de C.V. ("Cuprum"), seeking to recover for injuries he suffered when he fell from a ladder manufactured by Cuprum and sold by Builders Square. Builders Square filed its Notice of Removal to this court on May 20, 1999.

Cole is a resident of Oregon; Builders Square is a Delaware corporation, with its principal place of business outside of Oregon; Cuprum is a Mexican corporation, with its principal place of business outside of Oregon; and the amount

in controversy exceeds $75,000. Thus, this court has diversity jurisdiction pursuant to 28 USC § 1332.

Cole's Complaint alleges a products liability action against each defendant, seeking recovery for non-economic damages, past and future medical expenses, and past and future earnings. Due to its filing for bankruptcy, this case was stayed as to Builders Square. On July 28, 2000, Cole filed an Amended Complaint, deleting his claim against Builders Square and adding a $10 million claim for punitive damages against Cuprum. By Opinion and Order dated September 20, 2000, this court struck Cole's Amended Complaint with leave to replead for failure to comply with Federal Rule of Civil Procedure ("FRCP") 15, but rejected as premature Cuprum's alternative argument that amending the Complaint to add a punitive damages claim would be futile.

On September 26, 2000, Cole filed an Amended Complaint that included once again a claim against Cuprum for punitive damages. Cuprum's Motion for Summary Judgment (docket #53) against the punitive damages claim is now before the court. For the reasons stated below, that motion should be granted.

STANDARDS

Federal Rule of Civil Procedure ("FRCP") 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show an absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477 US 317, 323 (1986). Once the moving party shows the absence of an issue of material fact, the nonmoving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial. *Id* at 324. A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of Am. v.*

Phelps Dodge Corp., 865 F2d 1539, 1542 (9th Cir), *cert denied*, 493 US 809 (1989).

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F2d 626, 630 (9th Cir 1987). The court must view the inferences drawn from the facts in the light most favorable to the non-moving party. Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party. *Id* at 630-31. However, when the non-moving party's claims are factually implausible, that party must come forward with more persuasive evidence than would otherwise be required. *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics Inc.*, 818 F2d 1466, 1470 (9th Cir 1987), *cert denied*, 484 US 1006 (1988). The Ninth Circuit has stated, "No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *Id* at 1468.

FACTS

A review of the parties' facts, as well as the other materials submitted by the parties, including affidavits and deposition excerpts, reveals the following:[10]

In 1993, Cole's friend, Donald Worthington, purchased at Builders Square a 28-foot fiberglass extension ladder manufactured by Cuprum ("the model 534"). Amended Complaint, ¶ 3. Cuprum manufactured this ladder in December 1992. Cuprum's Supplemental Concise Statement of Material Facts, ¶ 1.

On July 3, 1998, Cole set up this ladder in front of a friend's house, and while an assistant adjusted the ladder from

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[10] All depositions are referred to by the deponents last name, followed by the page of the deposition transcript.

the ground, Cole adjusted the ladder from the roof. Cuprum's Amended Concise Statement of Material Facts, ¶¶ 1-2. Cole explained that from his position on the roof, the ladder appeared "perfectly normal:"

Q: So you didn't see the rung lock sticking out —
A: No.
Q: — in a way that looked unusual to you?
A: No.
Q: Everything looked perfectly -
A: Normal, as far as I could tell.
Q: Okay. So that's your own observation, your own eyes. How much time did you spend looking at the ladder before you asked [the assistant] how it looked?
A: Few seconds.
Q: Then you asked [the assistant]. What words did you use?
A: Exact words, I'm not sure. I asked him if it looked — if it was locked. He said, it looks good from down — you know, paraphrasing. I don't know exactly the words he said, but, you know, he indicated that it looked okay.

Cooke Depo, pp. 90-91.

When Cole began to climb down from the roof and placed his weight on the ladder, the ladder telescoped downwards. Cuprum's Amended Concise Statement of Material Facts, ¶ 3. Cole fell from the ladder and was severely injured. *Id.*

Cuprum began manufacturing the model 534 extension ladder in November 1989 and has since manufactured more than 10,000 such ladders. Cole's Response to Cuprum's Amended Concise Statement of Material Facts, ¶ 9. Cole alleges, and Cuprum denies, that the rung locks on the model

534 are defectively designed. *Id*, p. 3, ¶ 1. Specifically, Cole asserts that the model 534 ladder is unreasonably dangerous as designed because "the rung locks have a tendency to hang on the rung giving the appearance that the rung locks are engaged when they are not and then when a user climbs the extension section of the ladder it telescopes downward." Amended Complaint, ¶ 4.

The rung locks, when properly engaged, surround both the rung of the fly section and the base section. Cole's Response to Cuprum's Amended Concise Statement of Material Facts, ¶ 2. Cuprum readily admits that if a ladder's rung locks are mislocked, then it would be dangerous to climb. *Id*, ¶ 21. The 534 model bears two warning labels instructing the user to ensure the rung locks are set before using, a warning label instructing the user not to adjust the ladder from above, and a warning label that the user could die if the instructions are not followed. Cuprum's Amended Concise Statement of Material Facts, ¶¶ 8-10.

Ed Cooke ("Cooke") has been designated by Cuprum to handle all of their product liability litigation for the past 16 years. Affidavit of Ed Cooke ("Cooke Aff"), ¶ 1. As part of his duties, he tracks information about claims and law suits made against Cuprum. *Id.* He has identified and produced information concerning a total of seven claims and seven law suits involving the model 534 ladder. *Id*, ¶ 5. These include allegations involving any ladder component or feature, not just the rung locks. *Id.*

DISCUSSION

Cuprum's motion now seeks summary judgment solely against Cole's claim for punitive damages because Cole has not produced sufficient evidence for a jury to reasonably award such damages.

I. Legal Standard

In Oregon, a product liability civil action is:

> a civil action brought against a manufacturer, distributor, seller or lessor of a product for damages for personal injury, death or property damage arising out of: (1) Any design, inspection, testing, manufacturing or other defect in a product; (2) Any failure to warn regarding a product; or (3) Any failure to properly instruct in the use of a product.

ORS 30.900.

Plaintiffs may be entitled to an award of punitive damages in such cases. *See* ORS 30.925.[11] "The substantive criteria to considered by an Oregon factfinder in deciding whether to make an award of punitive damages in a product liability action and, if so, in setting the award, are set out in ORS 30.925." *Oberg v. Honda Motor Co., Ltd.*, 320 Or 544, 552, 888 P2d 8, 12 (1995). ORS 30.925 establishes a two-part test for such damages. The first part requires that "in a product liability civil action, punitive damages shall not be recoverable except as provided in ORS 18.537." ORS 30.925(1). ORS 18.537, enacted in 1995, provides in relevant part that:

> Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless

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[11] ORS 30.925 was amended in 1995. The amendments apply only to actions commenced on or after their effective date, which was September 9, 1995. Because Cole commenced this action in 1999, the current statute applies.

> and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.

ORS 18.537(1).

ORS 30.925 sets forth the following criteria in determining and awarding punitive damages:

> (a) The likelihood at the time that serious harm would arise from the defendant's misconduct;
>
> (b) The degree of the defendant's awareness of that likelihood;
>
> (c) The profitability of the defendant's misconduct;
>
> (d) The duration of the defendant's misconduct and any concealment of it;
>
> (e) The attitude and conduct of the defendant upon discovery of the misconduct;
>
> (f) The financial condition of the defendant; and
>
> (g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

ORS 30.925(2).

II. Analysis

A. ORS 18.537(1)

Cole asserts that he is entitled to seek punitive damages because he has presented sufficient evidence that a jury could reasonably find, by clear and convincing evidence, that Cuprum

acted with a "reckless and outrageous indifference to a highly unreasonable risk of harm" and "a conscious indifference to the health, safety and welfare of others."[12] ORS 18.537(1). Specifically, his claim for punitive damages alleges that "Cuprum's failure to warn the public about the tendency of the rung locks to hang on the rung giving the appearance that the rung locks are engaged when they are not was a serious compromise of safety and placed the consumers unnecessarily at great risk of serious injury." Amended Complaint, ¶ 13.

1. Defective Design

Cuprum first argues that the model 534 is not defective because its design, including the rung locks, was approved by two independent testing groups, Underwriter's Laboratories, Inc. ("Underwriters") and ANSI A 14.5 1992 - American Requirements ("ANSI"). Defendant's Amended Concise Statement of Material Facts, ¶¶ 6-7. In addition, Cuprum argues that because more than 10,700 of these ladders have been sold since 1988 and only 14 complaints, including Cole's, have been made, the design must be safe. Finally, Cuprum argues that Cole would not have been injured had he followed the warnings on the ladder.

Cole, however, presents evidence attacking the utility of the Underwriters and ANSI testing procedures, given the alleged defect in this case. One of his experts, David Paul, states that "Cuprum's assertion the Model 534-28 extension ladder passed the ANSI 14.5 and [Underwriters] tests for portable ladders has no bearing on whether the subject rung

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[12] The statute clearly allows a plaintiff to assert either that a defendant acted "with malice" *or* that a defendant acted with "a reckless and outrageous indifference to a highly unreasonable risk of harm." ORS 18.537(1). Cole proceeds under the second option and does not argue that Cuprum acted with malice.

locks are defectively designed because of their tendency to false lock as a result of friction." Affidavit of David Paul, ¶ 2.

Cole also presents the unequivocal opinions of three experts that the rung lock on the model 534 was defectively designed. Affidavit of Michael H. Bloom, Exhibit ("Ex") A, pp 1-9. For example, one of Cole's experts states bluntly that "[t]he Cuprum model 534-28 ladder used by Paul Cole on July 3, 1998 was defectively designed. The design defect involves the design of the rung locks or hooks used on the ladder." *Id*, p. 1. Lastly, any arguments concerning the warnings on the ladder are clearly related only to causation or comparative fault, and are not persuasive evidence that the rung locks were or were not defectively designed. Thus, at a minimum, Cole has created a fact issue on the question of whether the model 534 rung locks were defectively designed.

2. <u>Notice of Defect</u>

Second, Cuprum argues that it cannot be liable for punitive damages because it had insufficient notice of any design defect in the rung locks before it designed, manufactured, or sold the model 534 ladder. A defendant who manufactures or sells a product which he knows or should know is dangerous demonstrates the type of behavior that punitive damages are intended to deter. Similarly, a defendant in a product liability action who fails to warn of a known danger may be liable for punitive damages. As the Oregon Supreme Court has stated, "[p]unitive damages . . . are a penalty for conduct that is culpable by reason of motive, intent, or extraordinary disregard or indifference *to known or highly probable risks to others*." *Andor v. United Air Lines, Inc.*, 303 Or 505, 517, 739 P2d 18, 25 (1987) (emphasis added).

On the other hand, a defendant who does not and should not reasonably know that his product is dangerous does not exhibit the sort of behavior that punitive damages are designed

to punish and deter. ORS 18.537(1) clearly allows punitive damages only if the defendant knows, or reasonably should know, that his product creates a "highly unreasonable risk of harm" to others. Only then can a defendant be found guilty of a reckless and outrageous indifference and a conscious indifference to the health, safety and welfare of others. Simply put, once a plaintiff demonstrates that a defendant knew, or should have known, that his product is dangerous, he then must demonstrate that the defendant exhibited "reckless and outrageous indifference" and "conscious indifference." *See* ORS 18.537(1).

Oregon courts have universally recognized that a defendant cannot be liable for punitive damages in product liability civil claims unless it knows or should know that its product is dangerous. In *Axen v. American Home Products Corp.*, 158 Or App 292, 974 P2d 224 (1999), the injured plaintiff alleged that the defendant had intentionally failed to warn consumers that its product could cause permanent vision loss. The Oregon Court of Appeals determined under the former ORS 30.952 (which required"wanton misconduct") that "[f]or purposes of determining punitive damages, wanton misconduct is that which creates a substantial risk of harm to another and is purposefully performed *with an awareness of the risk* and a disregard of the consequences." *Id* at 312, 974 P2d at 238 (emphasis added). The court concluded that there was more than enough evidence for the jury to have found by clear and convincing evidence that the defendant:

> knew of the association between amiodarone use and optic neuropathy; that optic neuritis and optic neuropathy were not interchangeable diagnoses; that optic neuropathy could cause permanent vision loss; and that [the defendant] made a conscious choice not to warn of optic neuropathy. Moreover, there is evidence from which the jury could have concluded

> that [the defendant's] choice not to warn of optic neuropathy was driven, at least in part, by financial concerns related to its ability to market the product. Hence, there was sufficient evidence to permit the jury to conclude, by clear and convincing evidence, that [the defendant] had acted with extraordinary disregard of or indifference to known or highly probably risks to others. Accordingly, there was sufficient evidence under former ORS 30.925 to present the case for punitive damages to the jury.

Id at 312-13, 974 P2d at 238.

In *Lakin v. Senco Products, Inc.*, 144 Or App 52, 72, 925 P2d 107, 119 (1996), the plaintiff sued a pneumatic nail gun manufacturer for his injuries suffered from a nail gun accident. The Court of Appeals found that "the record discloses clear and convincing evidence sufficient to establish plaintiffs' entitlement to some award of punitive damages." *Id.* In particular, the court explained that:

> reasonable jurors could find that the following propositions were "highly probable": (1) Defendant had long been aware of the tendency of its nail guns to double fire. Nevertheless, it conducted no tests to determine when, or how frequently, double firing occurred, or the extent of injury that could result from double firing. (2) If defendant had undertaken tests relating to the [nail gun's] propensity to double fire, it would have known of the gun's potential to seriously injure users and could have changed its warnings or the design of the gun accordingly. We note, particularly, that defendant's own expert testified that defendant did not test its "safety warning" regarding double firing to ensure that the warning accurately instructed users regarding the appropriate means of

> avoiding double firing. Moreover, plaintiffs' experts testified that, in their testing of the [nail gun], they not only found that double firing occurred frequently, but also found that the recoil effects included the same type of inadvertent "bump fire" actuation that occurred with John Lakin. (3) Both the [nail gun's] design and its warnings could reasonably and practicably have been modified to make the gun's use safer . . . . Moreover, although defendant had manufactured a "restrictive trigger" modification of the [nail gun] that would eliminate the gun's ability to double fire, it did little to appraise users of the restrictive trigger or its safety purpose. In particular, although the "tool use" section of the [nail gun's] manual noted that the restrictive trigger was useful when place firing, the manual did not inform consumers that the restrictive trigger would protect against the danger of double fire. (4) Defendant's failure to effectively address the [nail gun's] double firing problem was conscious

Id at 72-73, 925 P2d at 119-20.

Therefore, whether Cuprum may be liable for punitive damages rests to a large extent on whether Cuprum knew or should have known of problems with the model 534 rung locks. As evidence that Cuprum possessed the requisite mental state, Cole relies on three lawsuits against Cuprum: *Bazan v. Cuprum, S.A., De C.V., et al*, Harris County District Court Cause No. 96-32221 (Texas 1996); *Jehnsen et al v. Builder's Square, Inc., et al*, Bay County Circuit Court Case No. 96-3148-NP-B (Michigan 1996); and *Watkins, et al v. Cuprum International, Inc., et al*, Brazos County District Court Cause No. 36.987-85 (Texas 1992). Affidavit of Michael H. Bloom ("Bloom Aff"), Ex A, pp. 29-34. He argues that by virtue of these three lawsuits, Cuprum knew of a dangerous defect in the

model 534 locking rungs, but has done nothing to protect the public.[13]

Cuprum responds that two of these three lawsuits are inadmissible because they arose after the ladder in question left Cuprum's control; the third lawsuit is too dissimilar to have provided notice of any design flaw in the rung locks; and that even if admissible, the three lawsuits are insufficient to support a claim for punitive damages.

a. Timing of the lawsuits

Two of the cases cited by Cole, *Bazan* and *Jehnsen*, were filed in 1996, well after the rung locks in this case were designed (in 1989), the ladder manufactured (in December 1992), and sold (sometime in 1993). Therefore, Cuprum argues that the lawsuits cannot be admitted to show that Cuprum had notice of a rung lock defect when it designed, manufactured, or sold the model 534 ladder. Cuprum's argument is well taken. These two lawsuits cannot be used to demonstrate knowledge of a defect at the time the model 534 at issue in this case was designed, manufactured, or sold. Had Cole sought to introduce these lawsuits to buttress a traditional failure to warn products liability claim, then, naturally, these lawsuits would be irrelevant.[14] However, Cole seeks to introduce these lawsuits

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[13] Q: What precautions does Cuprum take to ensure that the rung locks do not hang up in a mislocked position?
A: I don't know of any they can take.

Cooke Depo, p. 74.

[14] The lawsuits might be relevant, however, if Cole alleged a "post-sale" failure to warn products liability action. *See* Douglas R. Richmond, *Expanding Products Liability: Manufacturers' Post-Sale Duties to Warn, Retrofit and Recall*, 36 IDAHO L. REV 7, 17 (1999) (explaining that warnings that were or should have been given when a product is sold are

in support of a punitive damages claim as evidence of a continuing course of deliberate indifference to a known danger. As such, these lawsuits are relevant evidence and admissible.

The legal standard in Oregon applicable to post-verdict judicial review of a jury's award of punitive damages asks "Was the award of punitive damages within the range that a rational juror would be entitled to award in the light of the record as a whole?" *Oberg*, 320 Or at 551, 888 P2d at 12.

"The range that a rational juror is entitled to award depends, in turn, on the statutory and common law factors that the jury is instructed and permitted to consider when awarding punitive damages for a given claim." *Id.* These factors expressly contemplate the review of evidence of misconduct arising after the design, manufacture, or sale of a product. *See e.g.*, ORS 30.925(3)(d) & (e) (factors include "[t]he duration of the misconduct and any concealment of it" and "the attitude and conduct of the defendant upon discovery of the misconduct"); *see also Oberg*, 320 Or at 544, 888 P2d at 13 ("There was evidence that, when plaintiff's injury occurred, defendants had notice . . . that numerous injuries were occurring").

Cuprum argues that this court has in the past excluded evidence of post-manufacture defects when discussing punitive damages in a product liability action, citing *Knight v. Just Born, Inc.*, Civil Number 99-606-ST, Findings & Recommendations by Judge Stewart dated March 28, 2000,

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referred to as "point of sale" warnings and "post-sale" warnings refer to warnings allegedly required where a manufacturer does not know or have reason to know of a hazard at the time a product is sold, but discovers the hazard sometime later). The Oregon Supreme Court, however, has declined to express an opinion as to whether a continuing failure to warn claim states a cause of action "independent of the statutory product liability claim." *Sealey v. Hicks*, 309 Or 387, 399 n14, 788 P2d 435, 441 n14 (1990).

docket #32, adopted by Order of Judge King dated July 6, 2000, docket #39. In *Knight*, however, this court did not expressly exclude any of plaintiff's evidence but instead merely acknowledged that the plaintiff's claim for punitive damages "was based on the fact that between October 1994 and April 1998, Just Born received six complaints from other consumers about Hot Tamales that were, in essence, too hot." *Id* at 27. The candy at issue in that case was manufactured in May 1998. *Id* at 9. Plaintiff submitted no post-manufacture complaints. This court found summary judgment appropriate against the plaintiff's punitive damages claim because "the prior complaints are neither similar enough nor severe enough to justify a punitive damages award." *Id* at 27.

In another case decided by this court, *Van Westrienen v. Americontinental Collection Corp.*, Civil Number 99-819-ST, Opinion by Judge Stewart dated April 12, 2000, and cited by Cuprum, this court denied the defendants' summary judgment motion against the plaintiffs' punitive damages claim, stating:

> As discussed above, plaintiffs denied viewing the website in their depositions, but Kenneth Van Westrienen asserts that he viewed the website prior to filing the lawsuit. Whether he viewed the website before or after filing the lawsuit is irrelevant to a discussion of punitive damages, however. Punitive damages are primarily intended to "punish a wilful, wanton or malicious wrongdoer and to deter that wrongdoer and others similarly situated from like conduct in the future." *Friendship Auto v. Bank of Willamette*, 300 Or 522, 532, 716 P2d 715, 718 (1986). As such, the website is relevant to a determination of whether defendants' conduct was so egregious as to merit an award of punitive damages.

Id at 31.

The fact that the same alleged design defect in the rung locks of the model 534 ladder continues to cause injuries is relevant to establishing the dangerousness of the product and Cuprum's knowledge of that dangerous condition. These two lawsuits from 1996 may be critical to a jury's determination of whether Cuprum, in making and continuing to market the model 534 ladder, engaged in conduct that was "culpable by reason of motive, intent, or extraordinary disregard of or indifference to known or highly probably risks to others." *Andor*, 303 Or at 517, 739 P2d at 25. Accordingly, *Bazan* and *Jehnsen* are admissible to support Cole's punitive damages claim.

b. Similarity of the lawsuits

Next, Cuprum argues in vain that *Watkins* is inadmissible because Cole has failed to demonstrate its similarity to the present action. Rather, Cole has demonstrated that all three of the lawsuits are similar enough to be admitted as evidence.

To lay a foundation for the admission of evidence of other accidents to prove a design defect, or notice of a defect, the party must demonstrate that there is a substantial similarity between the products in question. *Cooper v. Firestone Tire & Rubber Co.*, 945 F2d 1103, 1105 (9th Cir 1991). Evidence regarding similar accidents is relevant under Rules 401 and 402 of the Federal Rules of Evidence. *Id.* "The rule rests on the concern that evidence of dissimilar accidents lacks the relevance required for admissibility under Federal Rules of Evidence 401 and 402." *Id.* The similarity standard is relaxed when the prior incidents are admitted to prove notice rather than to show the existence of a dangerous condition. *Pau v. Yosemite Park and Curry Co.*, 928 F2d 880, 889 (9th Cir 1991); *see also Waddill v. Anchor Hocking, Inc.*, 149 Or App 464, 468, 944 P2d 957, 960 (1997), *rev'd on other grounds*, 330 Or 376, 8 P3d 200 (2000) (noting that evidence of prior incidents

in product liability action was admissible "assuming that there is evidence that the manufacture of the fishbowls by the defendant and the particular uses were substantially similar to the manufacture and use of the fishbowl in this case").

Cole has submitted only the first page of the complaint in *Watkins* which evidences a lawsuit filed against Cuprum, but little else. Bloom Aff, Ex A, p. 29. It is even unclear whether *Watkins* concerns an accident involving a ladder. Cooke, however, remembered a few details about this lawsuit when he was shown the complaint in his deposition:

> Q: I [am] going to present you with Exhibit 9. That is a complaint of a lawsuit, *Watkins versus Cuprum*, one of the claims that you provided us with.
> A: That's not a telescoping case. That was an allegation, but it was proved that it was not a telescoping case.
> Q: There was an allegation that the ladder was mislocking, but you say it was proved otherwise?
> A: Yes. And we got a defendant's verdict in the case.
> Q: In that particular case, though, there was an allegation that the 534 was mislocking?
> A: That was his allegation.
> Q: And that particular complaint arose from an injury in April of 1991, correct?
> A: Oh, I don't remember.

Cooke Depo, p. 89.

Evidently, by Cooke's own testimony, *Watkins* concerns allegations of mis-locking with the rung locks of the model 534 extension ladder. It is true, as Cuprum points out, that Cole has not presented any factual details surrounding the *Watkins* incident, and *Watkins* may involve different factual

circumstances or legal claims. Yet the test here is one of "substantial similarity," not exactness. Under that standard, *Watkins* is admissible as evidence that Cuprum had notice of a potential problem with the model 534 rung locks.

Bazan and *Jehnsen* are also similar enough to be admissible into evidence. The *Bazan* complaint alleges that the plaintiff's injuries were caused by a defective rung lock: "Bazan was installing cable while using [the model 534 extension ladder] . . . when the latching mechanism of the ladder failed to operate as it was intended, the fiberglass extension ladder collapsed, which caused Plaintiff to fall to the ground." Bloom Aff, Ex A, p. 31. Likewise, the *Jehnsen* complaint alleges a faulty rung lock on a model 534 extension ladder: "As Gerald L. Jehnsen was standing with both feet on one of the rungs and his hands on the rails, the ladder suddenly collapsed." *Id*, p. 33. The *Jehnsen* complaint also alleges that Cuprum "knew . . . or should have known that the failure of the fly-lock to engage or lock and/or the occurrence of a 'false-lock' situation, where the fly lock does not properly engage the base rungs, could cause the fly-lock to slip out from the base rung, causing the ladder to slip." *Id,* p. 34.

c. <u>Sufficient evidence</u>

Lastly, Cuprum argues that even if these three lawsuits, *Bazan*, *Jehnsen*, and *Watkins*, areadmissible evidence to prove Cole's punitive damages, they are insufficient as a matter of law. Its argument is well taken.

First, *Watkins* resulted in a jury verdict for Cuprum. Cooke's testimony reveals his corresponding reasonable belief that the jury had completely rejected the plaintiff's allegation that the ladder had mis-locked. *See* Cooke Depo, p. 89 ("it was proved that it was not a telescoping case"). Thus, absent any contrary evidence, Cole cannot rely on *Watkins* to show that Cuprum had notice of a design defect in the rung locks of the

model 534 ladder.

Second, even if Cuprum had some notice of a potential problem with its rung locks, the model 534 passed the ANSI and Underwriters standards. These standards may not ultimately determine that the rung locks on the model 534 were safely designed, but they do show that Cuprum intended and attempted to design a safe ladder. *See e.g., Silkwood v. Kerr-McGee Corp.*, 485 F Supp 566, 583-84 (WD Okla 1979) (concluding that substantial compliance with regulatory scheme did not bar award of punitive damages, but noting that "[g]ood faith belief in, and efforts to comply with, all government regulations would be evidence of conduct inconsistent with the mental state requisite for punitive damages" under state law). Even if Cuprum had knowledge of several lawsuits alleging a defect, its successful adherence to safety standards should have provided reasonable reassurance that it was complying with industry standards.

Third, the two lawsuits filed in 1996, *Bazan* and *Jehnsen*, though factually very similar to the present suit, provide little hard evidence of culpable conduct. A lawsuit is merely a claim which may or may not have merit. This court has no information as to the outcome in those cases. Did the case go to trial, and, if so, who won? Did Cuprum believe that the lawsuits were meritless, yet settle them to avoid the difficulties and expense of litigation? Without more, this court is hard-pressed to consider the two lawsuits as evidence of Cuprum's knowledge of a defect.

Lastly, Cole has presented evidence of only three lawsuits filed while Cuprum reports that it manufactured over 10,000 model 534 extension ladders between 1989 and 1998. Given the large number of ladders manufactured and the small number of claims filed alleging a defect with the rung locks, this court is further convinced that no reasonable jury would

find that Cuprum acted, or failed to act, with the requisite knowledge. This court similarly noted in *Knight* that six complaints in four years concerning a product "presumably consumed by millions of people" was simply not enough evidence to create a jury question. *Knight*, p. 27.

Cole has argued that Cuprum's record-keeping is poor and has hinted that there may be many more claims and lawsuits against the model 534 ladder not yet discovered. A defendant may not escape the threat of punitive damages by concealing evidence that it knew of a product defect. ORS 30.925 makes this strategy extremely unwise, given that the factors delineated in ORS 30.925(2) include the degree of the defendant's awareness, the profitability of the defendant's misconduct, the duration of the defendant's misconduct and any concealment of it, and the attitude and conduct of the defendant upon discovery of the misconduct.

Cooke disclosed that prior to this case he was aware of other claims of mislocking rung locks on the model 534:

Q: Mr. Cooke, the 534 fiberglass ladder with — the same model that Mr. Cole was using, has been the subject of claims for mislocking, hasn't it?
A: Claims for what?
Q: Mislocking.
A: Sure.
Q: And as you said, those claims cross your desk, and you provided us with them.
A: Right.
Q: Can you recall when you first were aware of the first allegation that ladder mislocked?
A: That model of ladder or of a mislock?
Q: The 534
A: I have no concept.

Cooke Depo, pp. 88-89.

However, Cooke further explains that "[a]fter a claim or complaint is resolved, dismissed, or otherwise becomes inactive, the file is closed and purged per Cuprum retention policy." Cooke Aff, ¶ 3. "The information retained after purging claims files is limited to the claimant's name, ladder information, the Plaintiff's attorney's name and other accident information when available." *Id*, ¶ 4. Cooke produced to Cole's counsel all of the information he had concerning claims and lawsuits involving the model 534 ladder, even claims and lawsuits that did not involve the rung locks. *Id*, ¶ 5. Out of those seven claims and seven lawsuits identified by Cooke, Cole has provided evidence only of the three lawsuits discussed above. Presumably, the other 11 claims and lawsuits have nothing to do with the rung locks.

Thus, while Cuprum's record-keeping is somewhat sketchy, it does retain the most important information concerning claims and apparently did comply with Cole's requests for production. Thus, Cole has not presented the court with any evidence that Cuprum deliberately intended to shield itself by creating an artifice of ignorance.

In other cases involving ORS 30.275, successful plaintiffs are able to point to a great deal of evidence concerning the defendant's knowledge of, and disregard for, a defective or dangerous product. For example, in *Oberg*, the plaintiff credibly demonstrated that the defendants had known that their product was defective for over 15 years. *See Oberg*, 320 Or at 554-555, 888 P2d at 13. In *Lakin*, the plaintiff likewise demonstrated that the defendant had notice of dozens of incidents in which consumers had been injured as a result of the same defect that injured the plaintiff. *Lakin*, 144 Or App at 63, 925 P2d at 114.

Here, however, Cole has failed to present such evidence that a reasonable jury could conclude that Cuprum knew or

should have known of a danger in its product and continued nevertheless to design, produce, and sell it.

B. Conclusion

ORS 18.537(1) requires proof by clear and convincing evidence. Evidence is "clear and convincing" when "the truth of the facts asserted is highly probable." *In re Conduct of Blaylock*, 328 Or 409, 411, 978 P2d 381, 381-82 (1999). However, "[i]t is not our job to decide whether the evidence is clear and convincing, but to decide whether a jury could find that it is." *Onita Pacific Corp. v. Trustees of Bronson*, 122 Or App 452, 457, 858 P2d 453, 453 (1993).

Here, no reasonable jury could find that Cuprum has had notice, or should have had notice, of any defect in the rung lock mechanism of the model 534 extension ladder. Therefore, this court concludes that a reasonable jury could not determine by clear and convincing evidence that Cuprum acted with the requisite "reckless and outrageous indifference to a highly unreasonable risk of harm" and "conscious indifference to the health, safety and welfare of others" to satisfy ORS 18.537.

RECOMMENDATION

For the reasons stated above, Cuprum's Motion for Summary Judgment (docket #53) should be GRANTED.

SCHEDULING ORDER

Objections to the Findings and Recommendation, if any, are due November 27, 2000. If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, the response is due no later than December 14, 2000. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under

advisement.

DATED this 8th day of November, 2000.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PAUL COLE, Plaintiff, v. BUILDERS SQUARE, a Delaware corporation, and CUPRUM, S.A., de C.V., Defendants.	CV-99-729-ST ORDER

[Filed: January 9, 2001]

Magistrate Judge Janice M. Stewart filed her findings and Recommendation on November 9, 2000. The matter is now before me pursuant to 29 U.S.C. § 636 (b)(1)(B) and Fed. R. Civ. P. 72(b). When either party objects to any portion of the magistrate Judge's Findings and Recommendation, the district court must make a de novo determination of that portion of the Magistrate Judge's report. 29 U.S.C. § 636 (b)(1)(C); McDonnell Douglas Corp. v. Commodore Business Machines, Inc., 656 F. 2d 1309, 1313 (9th Cir. 1981), cert. denied, 455 U.S. 920 (1982).

Plaintiff has filed timely objections. I have, therefore, given the file of this case a de novo review. To the extent the Findings and Recommendation holds otherwise, the court affirms that the standard under ORS 18.537(1) is that plaintiff

must prove "by clear and convincing evidence that [defendant] has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others." With that comment, I ADOPT Magistrate Judge Stewart's Findings and Recommendation. Cuprum's Motion for Summary Judgement (docket #53) is granted.

IT IS SO ORDERED.

DATE this 8th day of January, 2001.

/s/ Owen M. Panner
OWEN M. PANNER
U.S. DISTRICT COURT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL COLE, Plaintiff-Appellant. v. BUILDERS SQUARE, INC., a Delaware corporation, et al., Defendants-Appellees.	No. 01-35491 D.C. No. CV-99-00729-PA District of Oregon, Portland ORDER

[Filed: November 14, 2002]

Before: GOODWIN, T.G. NELSON and GRABER, Circuit Court Judges.

Appellant's petition for rehearing is DENIED.

APPENDIX E

CONSTITUTIONAL PROVISIONS

The Seventh Amendment of the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Article I §17 of the Oregon Constitution provides:

> In all civil cases the right of Trial by Jury shall remain inviolate.

Amended Article VII §3 of the Oregon Constitution provides:

> In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict.

APPENDIX F

28 U.S.C. § 2072

The Federal Rules Enabling Act, 28 U.S.C. § 2072, provides:

> § 2072. Rules of procedure and evidence; power to prescribe
>
> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrates thereof) and courts of appeals.
>
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.
>
> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of this title.

APPENDIX G

FEDERAL RULE OF CIVIL PROCEDURE 56

Federal Rule of Civil Procedure 56 provides in pertinent part:

RULE 56. SUMMARY JUDGMENT

* * * * *

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgement sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgement as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone abought there is a genuine issue of liability alone although there is a genuine issue as to the amount of damages.

APPENDIX H

O.R.S. 18.537

O.R.S.. 18.537 provides in pertinent part:

18.537. Standards for award of punitive damages; required review of award by court; additional reduction of award for remedial measures.

(1) Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence that the party against whom punitive damages are sought has acted with malice or has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others.

APPENDIX I

O.R.S. 18.540

O.R.S.. 18.540 provides in pertinent part:

18.540. Distribution of punitive damages; notice to Department of Justice; order of application.

(1) Upon the entry of a verdict including an award of punitive damages, the Department of Justice shall become a judgment creditor as to the punitive damages portion of the award to which the Criminal Injuries Compensation Account is entitled pursuant to paragraph (b) of this subsection, and the punitive damage portion of an award shall be allocated as follows:

* * * * *

(b) Sixty percent shall be paid to the Criminal Injuries Compensation Account of the Department of Justice Crime Victims' Assistance Section to be used for the purposes set forth in ORS chapter 147. However, if the prevailing party is a public entity, the amount otherwise payable to the Criminal Injuries Compensation Account shall be paid to the general fund of the public entity.

Supreme Court, U.S.
FILED
APR 16 2003
OFFICE OF THE CLERK

No. 02-1190

In The

Supreme Court of the United States

PAUL COLE,

Petitioner,

v.

BUILDERS SQUARE, INC. AND CUPRUM, S.A. DE C.V.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE RESPONDENT IN OPPOSITION

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38 pp

QUESTIONS PRESENTED

1. May Petitioner assert before this Court an issue that he not only failed to present to the Court of Appeals but that affirmatively contradicts what Petitioner told the Court of Appeals was the applicable law?

2. Are the Oregon summary judgment standard and the federal summary judgment standard the same, thus rendering "choice of law" a moot question?

3. Should the Court refuse to grant a writ of certiorari in accordance with the guidelines stated in Supreme Court Rule 10 where Petitioner has admitted in his Petition for Rehearing to the Ninth Circuit that the alleged error "came in applying the law to the facts"?

4. Was Petitioner's proof too weak to withstand summary judgment on the question of punitive damages even under the standard that Petitioner now (and erroneously) contends is applicable?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Paul Cole, an individual. Respondent is Cuprum S.A., de C.V. ("Cuprum"), a Mexican corporation. Pursuant to Supreme Court Rule 29.6, Cuprum states that it has no parent corporation and that no publicly held corporation owns 10% or more of Cuprum's stock. (Petitioner erroneously listed Builders Square, Inc., in the caption of his Petition. Builders Square is no longer a party to this proceeding.)

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OPINIONS BELOW

The Ninth Circuit's unreported Memorandum Decision is found at page 1a of the Petitioner's Appendix ("Pet. App.") and at 48 Fed. Appx. 684 (9th Cir. 2002). The unreported rulings of the United States District Court for the District of Oregon are found in Pet. App. at pages 6a and 29a. The unreported order of the Ninth Circuit denying rehearing is found in Pet. App. at page 31a.

JURISDICTION

The Ninth Circuit entered its decision on October 11, 2002. Petitioner's timely Petition for Rehearing was denied by order filed November 14, 2002. Petitioner filed a timely Petition for Writ of Certiorari on February 11, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This diversity case involves the grant of summary judgment on Petitioner's claim for punitive damages under Oregon law. Punitive damages under Oregon law are governed by O.R.S. § 18.537(1) and O.R.S. § 30.925. O.R.S. § 18.537(1) provides as follows:

> **Punitive damages are not recoverable in a civil action unless it is proven by clear and convincing evidence** that the party against whom punitive damages are sought has acted with malice or has shown **a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a**

conscious indifference to the health, safety and welfare of others.

(emphasis added).

O.R.S. § 30.925 provides as follows:

(1) In a product liability civil action, punitive damages shall not be recoverable except as provided in ORS 18.537.

(2) Punitive damages, if any, shall be determined and awarded based upon the following criteria:

(a) The likelihood at the time that serious harm would arise from the defendant's misconduct;

(b) **The degree of the defendant's awareness of that likelihood;**

(c) The profitability of the defendant's misconduct;

(d) The duration of the misconduct and any concealment of it;

(e) The attitude and conduct of the defendant upon discovery of the misconduct;

(f) The financial condition of the defendant; and

(g) The total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected.

(emphasis added).

STATEMENT OF THE CASE

Petitioner Paul Cole sued in Oregon state court for injuries received when he fell from a ladder manufactured by Cuprum. After the case was removed to federal court on the basis of diversity of citizenship under 28 U.S.C. §§ 1332 and 1441, the district court, adopting the findings and recommendations of the magistrate judge, granted summary judgment for Cuprum on the issue of punitive damages.[1] The case subsequently went to trial on Petitioner's two theories of strict liability: design defect and failure to warn. At the close of Petitioner's case, the district court granted judgment as a matter of law for Cuprum. On appeal, the Ninth Circuit reversed the judgment for Cuprum on the two strict liability claims and remanded for a new trial.[2] That ruling is not at issue here.

As to the grant of summary judgment for Cuprum on punitive damages, however, the Court of Appeals affirmed.[3] That is the ruling on which Petitioner seeks a writ of certiorari. Although Petitioner told the Ninth Circuit in his Opening Brief that the federal standard embodied in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), applied to the summary judgment ruling,[4] and although Petitioner told the Ninth Circuit in his Reply Brief that the issue was whether a jury could find by clear and convincing evidence that the standard for punitive

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[1] CR 79 (Pet. App. at p. 29a) and CR 69 (Pet. App. at p. 6a).

[2] Pet. App. at p. 1a.

[3] Pet. App. p. 1a.

[4] Respondent's Appendix ("Resp. App.") at pp. 3-4.

damages had been met,[5] Petitioner now tells this Court that the Ninth Circuit erred by applying the federal summary judgment standard and requiring a showing of liability for punitive damages by clear and convincing evidence.

According to Petitioner, this is the case in which to decide whether a federal court sitting in diversity should apply the state or federal standard for summary judgment. This is not that case. Not only has Petitioner taken the opposite position below as to the applicability of the federal standard, but on rehearing Petitioner expressly told the Ninth Circuit that there was *no difference* between the federal and Oregon standards for summary judgment[6] (which is true). Moreover, Petitioner also told the Ninth Circuit on rehearing that the "error" of which he complained consisted in the application of the law to the facts[7] – surely not a "cert. worthy" issue for this Court.

Finally, the Petition for a Writ of Certiorari should be denied because Petitioner's only evidence on the issue of punitive damages (the existence of three prior lawsuits against Cuprum involving the same model ladder, two of which resulted in defense verdicts and the third of which was settled prior to trial) was so weak that summary judgment was warranted no matter what evidentiary standard was applied.

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[5] Resp. App. at p. 8.

[6] Resp. App. at p. 14.

[7] Resp. App. at p. 12.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED WHERE PETITIONER NOT ONLY FAILED TO RAISE THE ISSUE BELOW BUT IN FACT TOOK THE DIAMETRICALLY OPPOSITE POSITION BELOW

Supreme Court Rule 15(2) requires a Respondent to call to the Court's attention no later than the Brief in Opposition "[a]ny [non-jurisdictional] objection to consideration of a question presented based on what occurred in the proceedings below." Cuprum points out that such objections do exist here. It is a fundamental precept of appellate law that "issues must be raised in lower courts in order to be preserved as potential grounds of decision in higher courts. [T]his principle . . . requires that the lower court be fairly put on notice as to the substance of the issue." *Nelson v. Adams, USA, Inc.*, 529 U.S. 460, 469 (2000). Thus, " '[w]here issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.' " *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998), quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

Indeed, even where an issue is raised below it is considered untimely and consideration by this Court is "preclude[d]" if the matter is not raised until briefing on a petition for rehearing. *Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984). Moreover, it is generally recognized "under the 'invited error' doctrine 'that a party may not complain on appeal of errors that he himself invited or provoked the [ ] court . . . to commit.' " *United States v. Wells*, 519 U.S. 482, 488 (1997), quoting *United States v. Sharpe*, 996 F.2d 125, 129 (6th Cir. 1993).

The instant Petition violates all of these principles and then some. Not only did Petitioner fail to argue below that a court sitting in diversity must apply the relevant state law summary judgment standard, but he told the Court of Appeals precisely the opposite. In his Opening Brief to the Ninth Circuit, Petitioner affirmatively represented to that Court that the standard for summary judgment was defined by *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), and two other federal cases that applied the federal summary judgment standard. *See* Resp. App. at pp. 3-4. Now, however, Petitioner continually vilifies *Anderson v. Liberty Lobby* and tells this Court that *Anderson* "is clearly inapposite here." Petition at p. 15.

Similarly, Petitioner told the Court of Appeals in his Reply Brief that "[a]t the summary judgment stage, the court's obligation is simply to examine the facts in a light most favorable to Cole and determine whether a jury *could* find the evidence clear and convincing." Resp. App. at p. 8 (emphasis in the original). It is undisputed that O.R.S. § 18.537(1) provides that "[p]unitive damages are not recoverable in a civil action unless" the requisite mental state of the defendant "is proven by clear and convincing evidence."

To this Court, Petitioner tells a much different story. Now, Petitioner claims that "The Magistrate Erroneously Applied A 'Clear And Convincing' Standard Instead Of Oregon's 'Any Evidence' Standard." Petition at p. 4. That assertion is especially disingenuous given the fact that the case Petitioner relied upon in his Reply Brief below was an

Oregon case,[8] *Onita Pacific Corp. v. Trustees of Bronson*, 858 P.2d 453, 456 (Or. Ct. App. 1993), *that applied the clear and convincing standard. See* Resp. App. at p. 8. Notably, Petitioner fails to cite that Oregon case in his Petition to this Court.

And even after Petitioner lost at the Ninth Circuit and that Court affirmed the grant of summary judgment for Cuprum on the claim for punitive damages, Petitioner did not raise in his Petition for Rehearing the issue that the Court should have applied the Oregon rather than the federal summary judgment standard. In affirming the summary judgment, the Ninth Circuit ruled that "[f]ederal law applies to the 'question of the quantum of proof necessary to sustain a cause of action.'" Pet. App. at pp. 3a-4a, citing *Safeway Stores v. Fannan*, 308 F.2d 94, 97 (9th Cir. 1962). In requesting rehearing, Petitioner did not challenge that ruling or contend that the Oregon summary judgment should have applied. To the contrary, Petitioner affirmatively represented to the Ninth Circuit that "Oregon's summary judgment standard is not unlike the federal standard," citing *Taylor v. Baker*, 566 P.2d 884, 886 n.2 (Or. 1977). *See* Resp. App. at p. 14. Not surprisingly, the *Taylor* case is another decision that Petitioner has elected not to bring to this Court's attention.

The issue that Petitioner raised on rehearing at the Court of Appeals was whether evidence of three prior lawsuits against Cuprum involving the same model ladder

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[8] And the citation of that Oregon case also shows that the issue Petitioner seeks to raise here is moot because the Oregon and federal summary judgment standards are in fact the same. *See* Section II, *infra*.

was sufficient to have given Cuprum "notice" for purposes of a claim for punitive damages. (In other words, would such lawsuits have made Cuprum "aware" of the "likelihood" of "serious harm" within the meaning of Oregon's punitive damages statute, O.R.S. § 30.925.) Nowhere in his Petition for Rehearing did Petitioner even mention the "clear and convincing" evidentiary standard much less claim that such standard was not to be considered in ruling on a summary judgment motion under Oregon law. Yet this is the thesis that forms the lynchpin of Petitioner's argument to this Court.

Having told the Ninth Circuit that (1) the federal summary judgment standard was applicable, and (2) the district court's obligation on summary judgment was to determine whether a jury could find liability for punitive damages by clear and convincing evidence, and (3) the Oregon and federal summary judgment standards were the same, Petitioner cannot now ask this Court to reverse the Court of Appeals for having embraced the very standard that Petitioner said was appropriate.

II. PETITIONER RAISES A "FALSE CONFLICT," FOR FEDERAL AND OREGON SUMMARY JUDGMENT STANDARDS ARE THE SAME

There is no dispute that Oregon substantive law applied to this products liability case that was removed from Oregon state court to federal court on the basis of diversity of citizenship. What Petitioner asks this Court to do is rule that the summary judgment standard represents substantive law and thus a district court sitting in diversity must follow the state and not the federal standard under *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). The Ninth Circuit takes the position that federal law governs

the question of the sufficiency of the evidence in diversity cases. *See Safeway, supra, following Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 533-40 (1958); *Neely v. St. Paul Fire & Marine Ins. Co.*, 584 F.2d 341, 345 & n.3 (9th Cir. 1978) (noting that this approach "accords with the view taken by the commentators").

This Court has declined to reach this question on at least two occasions in the analogous context of the sufficiency of the evidence to support a jury verdict. *See Mercer v. Theriot*, 377 U.S. 152, 156 (1964); *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444-45 (1959). In *Dick*, the Court recognized that "[l]urking in this case is the question of whether it is proper to apply a state or federal test of sufficiency of the evidence to support a jury verdict where federal jurisdiction is rested on diversity of citizenship." 359 U.S. at 444-45. The Court declined to reach that issue because, *inter alia*, "the two standards [North Dakota and federal] are substantially the same." *Id.* at 445 (footnote omitted). That is also true here with respect to the federal and Oregon summary judgment standards.

Thus, Petitioner raises at most a "false conflict" in asking this Court to decide whether federal or Oregon law should control the disposition of Cuprum's motion for summary judgment on punitive damages. "'A 'false conflict' exists when the potentially applicable laws do not differ.'" *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 839 n.22 (1985), quoting E. Scoles & P. Hay, CONFLICT OF LAWS § 2.6, p. 17 (1982). *Cf. Cleary v. News Corp.*, 30 F.3d 1255, 1265 (9th Cir. 1994) (refusing to decide which state's law applied in diversity action because there was no "true conflict" as the laws of California and Illinois were "virtually identical" on the issue involved).

As Petitioner told the Ninth Circuit in requesting rehearing, "Oregon's summary judgment standard is not unlike the federal standard." Resp. App. at p. 14 (footnote omitted). In support of that proposition, Petitioner relied below upon *Taylor v. Baker*, *supra*, a 1977 decision in which the Oregon Supreme Court discussed the fact that Oregon's summary judgment standard[9] was patterned after Rule 56 of the Federal Rules of Civil Procedure (with the exception of the omission of subsection (d) of Rule 56 from the Oregon standard). 566 P.2d at 142 n.2. More recently, the Oregon Supreme Court reaffirmed the rule of *Taylor v. Baker* as to the similarity of the federal and Oregon summary judgment standards. *See Jones v. General Motors Corp.*, 939 P.2d 608, 616 (Or. 1997).

The Oregon and federal standards for the disposition of motions for summary judgment are in fact the same. Petitioner's new theory, that Oregon merely requires the production of "any evidence" to withstand a motion for summary judgment, even when the motion concerns punitive damages, which Oregon law requires to be proven by "clear and convincing" evidence, finds no support in Oregon law. Petitioner claims that *Jones* holds that the summary judgment standard is "any evidence." Petition at p. 5 n.14. This is not true. What the Oregon Supreme Court actually said in *Jones* was that "sufficient evidence" was required:

> "In deciding whether a genuine issue of fact exists, courts generally read 'genuine issue' to

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[9] That standard was then contained in O.R.S. § 18.105 (repealed 1979). The standard is now set forth in Rule 47 of the Oregon Rules of Civil Procedure.

> mean 'triable issue.' Before a party has a triable issue, **he or she must have *sufficient evidence* to be entitled to a jury determination**. This has led both courts and commentators to compare the motion for summary judgment to the motion for a directed verdict. **10 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE § 2713."**

(emphasis added), quoting *Seeborg v. General Motors Corp.*, 588 P.2d 1100, 1103 (Or. 1978).

The fact that the Oregon Supreme Court relied upon the Wright & Miller treatise FEDERAL PRACTICE AND PROCEDURE in describing the summary judgment standard should put to rest Petitioner's notion that the Oregon and federal summary judgment standards differ. They do not.

In Oregon, just as under Federal Rule 56, in ruling on a motion for summary judgment on an issue for which the evidentiary standard is "clear and convincing," such as punitive damages, the trial court must determine whether a reasonable jury could find the elements of the claim by clear and convincing evidence. That is precisely what the Oregon Court of Appeals held in *Onita Pacific Corp.*, 858 P.2d at 456, relied upon by Petitioner below, with respect to the analogous situation of a directed verdict on a fraud claim (which similarly requires proof by "clear and convincing" evidence under Oregon law). As the *Onita Pacific* Court held:

> It is not our job to decide whether the evidence is clear and convincing, **but to decide whether a jury could find that it is.**

Id. (emphasis added). That is what the magistrate judge did below. Indeed, the magistrate judge quoted the same

language from *Onita Pacific* set forth above that Petitioner later quoted to the Ninth Circuit in his Reply Brief. *Compare* Pet. App. at p. 27a *with* Resp. App. at p. 8. Federal law is the same. *See Anderson v. Liberty Lobby*, 477 U.S. at 254 (the federal standard requires the court to "view the evidence presented through the prism of the substantive evidentiary burden").

Petitioner's theory that the federal and Oregon standards differ is based on *Bolt v. Influence, Inc.*, 43 P.3d 425 (Or. 2002), a case involving the standard for amending a complaint to add a claim for punitive damages. The statute setting forth the standard to amend a complaint to add a claim for punitive damages is O.R.S. § 18.535(3); the statute proving that punitive damages may not be recovered unless the plaintiff establishes the mental state of the defendant by clear and convincing evidence is O.R.S. § 18.537(1). The *Bolt* Court explained that "**[t]hose statutes** [O.R.S. § 18.535(3) and O.R.S. § 18.537(1)] do not refer to each other and, in our view, they **are directed at unrelated issues**; the burden of proof required to *amend a complaint* to plead punitive damages and, in contrast, the burden of proof required to *recover* punitive damages at trial." 43 P.3d at 428 (italics in the original; boldface added). Nothing in *Bolt* supports Petitioner's thesis that an Oregon court would refuse to take into account the clear and convincing evidentiary standard when ruling on a motion for summary judgment on punitive damages. Because the federal and Oregon summary judgment standards are the same, Petitioner presents at best a "false conflict" that does not merit consideration by this Court.

III. THE PETITION INVOLVES ONLY THE APPLICATION OF LAW TO FACT, WHICH IS NOT A PROPER SUBJECT FOR CERTIORARI

Supreme Court Rule 10 provides that "[a] *petition* for a writ of certiorari *is rarely granted when the asserted error consists of* erroneous factual findings or *the misapplication of a properly stated rule of law.*" (emphasis added). Yet, in petitioning the Ninth Circuit for rehearing, Petitioner specifically described the ruling below that the Court of Appeals had allegedly erred in affirming as involving *the misapplication of law to facts*:

> *The Magistrate who heard the motion made a number of appropriate preliminary observations and rulings.* She acknowledged that for purposes of summary judgment she would accept as true the opinions of Cole's three experts that Cuprum's rung lock design was defective and posed a danger to users; she properly assigned no weight to Cuprum's contrary evidence; and she properly framed the issue under Oregon law as turning on whether Cuprum had prior notice of "problems with the Model 534 rung locks." *Her error, however, came in applying the law to the facts.* She ignored Cole's unrefuted evidence that the prior claims and suits put Cuprum on notice that its ladder posed a danger to consumers.

Resp. App. at pp. 11-12 (emphasis added).

Under this Court's Rule 10, Petitioner's lament that the magistrate misapplied the law to the facts does not present an issue that merits attention. Moreover, the fact that Petitioner told the Ninth Circuit on rehearing that the error "came in applying the law to the facts" is further evidence that Petitioner did not complain below that the summary judgment motion had been decided under an

erroneous evidentiary standard, as he now tells this Court. It is far too late to assert such a theory in a Petition for a Writ of Certiorari.

IV. PETITIONER COULD NOT SATISFY THE OREGON CRITERIA FOR PUNITIVE DAMAGES UNDER ANY EVIDENTIARY STANDARD

This Court did not need to decide whether the state or federal standard was applicable to determine the sufficiency of the evidence to support the jury verdict in another diversity action, *Mercer,* because "[t]he evidence was sufficient under any standard which might be appropriate – state or federal." 377 U.S. at 156. The same holds true here. Whether Cuprum's motion for summary judgment on punitive damages is judged under the "clear and convincing" evidentiary standard (which is required under either federal or Oregon law) or the lesser "any" evidentiary standard that Petitioner now (and erroneously) claims is applicable, the result is the same. Petitioner failed to adduce evidence from which a reasonable jury could have concluded that Petitioner met Oregon's stringent standards for an award of punitive damages.

As shown in the passage of the Petition for Rehearing quoted in Section III, *supra*, the critical issue below was whether Cuprum had *prior notice* of alleged problems with the rung locks on the Model 354 ladder, as required by Oregon law. *See* O.R.S § 30.925(2)(b) (one criterion for punitive damages is the degree of the defendant's "awareness" of the likelihood of serious harm); O.R.S. § 18.537(1) (in order for punitive damages to be recoverable, a defendant must know, or reasonably should know, that its product creates a "highly unreasonable risk of harm" to

others). *See also Andor v. United Air Lines, Inc.*, 739 P.2d 18, 25 (Or. 1987) ("[p]unitive damages . . . are a penalty for conduct that is culpable by reason of motive, intent, or extraordinary disregard or indifference to *known or highly probable risks to others*") (emphasis added).

The only evidence Plaintiff presented of Cuprum's "notice" of the alleged defect, however, consisted of *three* lawsuits involving the same model ladder – *three* lawsuits, despite the fact that Cuprum established that it had manufactured over *10,000* Model 534 ladders between 1989 and 1998. Pet. App. at p. 24a. The magistrate found all three lawsuits were admissible to prove the punitive damages claim. Pet. App. at pp. 18a-23a. Yet the magistrate concluded that evidence of these three lawsuits was insufficient to prove that Cuprum had the requisite notice concerning the allegedly defective nature of the design of its ladder rung locks.

This conclusion was warranted under any evidentiary standard. What Petitioner tries to ignore (after having candidly admitted it in his Opening Brief to the Ninth Circuit) is the fact that *two of those three lawsuits resulted in defense verdicts for Cuprum*. Resp. App. at p. 3. Thus, the only "notice" that those lawsuits afforded Cuprum was notice that its ladder design was *not* defective. And the third lawsuit on which Petitioner relied was *settled* prior to trial. Resp. App. at p. 3. Such a suit was similarly insufficient to give Cuprum the "notice" required by O.R.S §§ 30.925(2)(b) and 18.537(1) and decisions such as *Andor v. United Air Lines*. This is simply not a case such as *Oberg v. Honda Motor Co.*, 888 P.2d 8, 13-14 (Or. 1995), relied upon by Petitioner, in which punitive damages were warranted because a defendant continued to sell its three-wheeled motorcycles for 14 years despite having actual,

not assumed, knowledge of a design defect based upon a federal government investigation into the safety of the product. There was no such notice here.

Evidence of two defense verdicts and one settled complaint could not give Cuprum the requisite notice under Oregon law regardless of what evidentiary standard was applied. Cuprum was therefore entitled to summary judgment on Petitioner's claim for punitive damages.

CONCLUSION

Cuprum respectfully submits that the Petition for a Writ of Certiorari should be denied. Petitioner's failure to preserve any issue for review, his affirmative representations below contradicting the positions espoused before this Court, and the absence of any merit to the substance of Petitioner's claim for punitive damages all counsel that the Court should refuse to grant the Petition.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35491

PAUL COLE,

Plaintiff-Appellant,

v.

BUILDERS SQUARE, INC., a Delaware corporation; CUPRUM, S.A. de C.V.,

Defendant-Appellee

OPENING BRIEF OF PLAINTIFF-APPELLANT PAUL COLE

Appeal from the Judgment of the United States District Court for the District of Oregon
Civil No. CV99 00729 PA
Honorable Owen M. Panner,
United States District Court Judge

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Of Attorneys for Plaintiff-Appellant
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* * *

[Page 7] At the close of Cole's case in chief, the trial court directed a verdict against him. It held that Cole failed to establish a jury issue as to whether Cuprum's ladder was

dangerously defective under the *consumer expectation* test, the test adopted by Oregon to establish product liability. It also held that because Cole failed to follow instructions, he was barred from recovering as a matter of law.

This appeal challenges the trial court's grant of a directed verdict along with a number of other rulings that were made and will arise on remand.

V. SUMMARY OF ARGUMENT

A. The trial court erred in relying on the Oregon Court of Appeals decision in *McCathern v. Toyota* in directing verdict against Cole for failing to prove an alternative safer design. The later Oregon Supreme Court decision in *McCathern*, made clear the Oregon Court of Appeals was wrong. Proof of an alternative safer design is not necessary to prove liability in a design case. If the product is dangerous beyond what is expected by a consumer, the manufacturer is liable. Nevertheless, Cole presented a number of design measures Cuprum could have utilized to eliminate the danger caused by its false locking rung lock.

The trial court also erred in directing verdict on Cuprum's affirmative defense that Cole failed to follow the ladder's instructions. The effect of the trial court's ruling was to improperly shift the burden of proving the defense from Cuprum to Cole. And by doing so, the trial court deprived Cole of the right to [Page 8] challenge the validity of the defense through cross examination and rebuttal evidence.

B. The Magistrate erred in granting summary judgment on Cole's punitive damage claim on the grounds that the three prior lawsuits against Cuprum alleging the

same design defect could not constitute notice because none of the suits resulted in plaintiff's verdicts. The ultimate resolution of a prior claim is not relevant to its admissibility to prove notice of a product defect. All that is necessary is that the claims are substantially similar. And here, all three met that standard.

C. At trial, Cole offered the three prior lawsuits to prove that Cuprum had prior notice of the problem with its rung lock. The trial judge made the same mistake as the Magistrate did by excluding two of the lawsuits on the grounds that they resulted in defense verdicts. The trial court also erred in the third lawsuit, which settled, on the basis that admitting the claim to prove notice would require trying the merits of the claim. But again, because the ultimate resolution of the claim is not relevant to its ability to impart notice, the merits of the claim are also not relevant, eliminating the fear of having to try the merits of the case.

D. The trial court erred in excluding Cole's expert testimony on the standard of care in the ladder industry on the basis that the jury was capable of making that determination without the aid of expert testimony. A jury cannot be

* * *

[Page 28] The Magistrate's conclusion is unsupportable.

2. Standard of review for summary judgment

The court must view the evidence presented in a motion for summary judgment in the light most favorable to the opposing party. "The evidence of the non-movant is

to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986). "At the summary judgment stage, the non-movant's version of any disputed issue of fact is presumed correct." *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 456, 112 S.Ct. 2072, 2076 (1992); *T.W. Elec Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630-631 (9th Cir. 1987). In other words, Cole's facts are presumed true and are to be believed.

3. Punitive damage standard

If Cole establishes facts that – when viewed in a light most favorable to him – create an inference that Cuprum "has shown a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to the health, safety and welfare of others," he is entitled to have the jury hear his claim for punitive damages. ORS 18.537(1). Cole presented such facts.

* * *

[Page 28] striking Cole's punitive damage claim should be reversed, and the jury should be allowed hear the claim.

C. The Trial Court Erred in Excluding Evidence of Prior Similar Claims

1. Background

Cole sought to impose liability on Cuprum under two theories: 1) strict liability under Oregon's product liability statute; and, 2) common law negligence. Cole's negligence claim was based on Cuprum's continued sale of ladders

that it knew or should have known were dangerously defective; its failure to either retrofit or recall those ladders already in commerce; and its failure to issue a danger warning to ladder users.[86]

To prove that Cuprum was aware of the dangerous characteristics of its rung lock design long before Cole's injury, Cole introduced the three prior suits discussed above. But the trial court made the same error as the Magistrate did, ruling that two of the lawsuits, *Bazan* and *Watkins*, were not admissible on the issue of notice because they each resulted in defense verdicts.[87] The trial court held that the third lawsuit – *Jehnsen*, which settled – was inadmissible pursuant to FRE 403. In performing its FRE 403 analysis, the court accepted Cuprum's

* * *

[Page 49] benefits from a collateral source for injuries and expenses. Thus, the party who should benefit from insurance is the party who responsibly procures the insurance and pays its premiums, not a tortfeasor who causes personal injury.

On remand, the trial court's ruling limiting Coles recovery should be reversed and Cole should be entitled to recover the full $153,711 in medical bills.

VII. CONCLUSION

Giving Cole the benefit of every reasonable inference, whether Cuprum's rung lock posed an unexpected danger

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[86] Pretrial Order, ER10 at 116.

[87] ER13 at 130-32.

was a factual question that should have been determined by the jury. This court should reverse the trial court's judgment and remand for a new trial. On remand, this court should allow Cole to present his punitive damage claim to the jury. Finally, this court should remedy the trial court errors that will arise during remand.

Respectfully Submitted,

BLOOM & SCHUCKMAN, P.C.

By: /s/ Michael H. Bloom
Michael H. Bloom,
OSB No.81510
Of Attorneys for Plaintiff
Paul Cole

Resp. App. 7

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35491

PAUL COLE,

Plaintiff-Appellant,

v.

BUILDERS SQUARE, INC., a Delaware corporation; CUPRUM, S.A. de C.V.,

Defendant-Appellee

REPLY BRIEF OF PLAINTIFF-APPELLANT PAUL COLE

Appeal from the Judgment of the United States District Court for the District of Oregon
Civil No. CV99 00729 PA
Honorable Owen M. Panner,
United States District Court Judge

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* * *

[Page 18] **II.**
SUMMARY JUDGMENT ON PUNITIVE DAMAGES

A. If an Issue of Fact Exists, Then Summary Judgment Is Inappropriate

Cuprum attempts to elevate Cole's burden to defeat its summary judgment motion by suggesting that this Court must weigh the evidence and determine whether it is clear and convincing. Respondent's Brief at 24. Cuprum is wrong. At the summary judgment stage, the court's obligation is simply to examine the facts in a light most favorable to Cole and determine whether a jury *could* find the evidence clear and convincing, not whether it is:

> "It is not our job to decide whether the evidence is clear and convincing, but to decide whether a jury could find that it is." *Onita Pacific Corp. v. Trustees of Bronson*, 122 Or. App. 452, 457, 858 P.2d 453 (1993).

B. The Magistrate's Grant of Summary Judgment Was Based on the Premise That No Juror Cuold Find That Cuprurm Knew or Should Have Known of the Ladder's Dangerous Propensities

Cuprum next attempts to hide the basis of the Magistrate's ruling by carefully quoting around the ruling's pivotal language. Nowhere does Cuprum mention that at the heart of the Magistrate's ruling was the finding that no reasonable jury could find that Cuprum knew or should have known of the dangerous propensities of its ladder:

* * *

[Page 32] Brief at 48.) In fact, Cuprum fails to cite any authority, which is ironic, as it is Cuprum that accuses Cole of failing to provide any Oregon authority.

VI.
CONCLUSION

Based upon the foregoing, this Court should reverse the judgment entered against Cole and remand to the trial court for a new trial.

Respectfully Submitted,

BLOOM & SCHUCKMAN, P.C.

By: /s/ Michael H. Bloom
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-35491

PAUL COLE,

Plaintiff-Appellant,

v.

BUILDERS SQUARE, INC., a Delaware corporation; CUPRUM, S.A. de C.V.,

Defendant-Appellee

PETITION FOR REHEARING

Appeal from the Judgment of the United States District Court for the District of Oregon

Honorable Owen M. Panner,
United States District Court Judge

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[Page 2] 1995.[2] All three resulted in lawsuits naming Cuprum as a defendant. *Watkins* was filed in 1992[3], *Bazan* in 1994[4] and *Jensen* in 1996.[5] And each alleged the same design defect that is at issue in the instant case caused serious injury.

Even in the brunt of these claims, Cuprum failed to take any action to correct its design or to warn consumers of the danger. Instead it continued to manufacture and sell ladders it knew to be defective. Eventually, in 1998, Cole was seriously injured.

Cole sought punitive damages to deter Cuprum and others similarly situated from ignoring such hazards. Cuprum moved for a summary judgment of dismissal against Cole's punitive damage claim.[6]

The Magistrate who heard the motion made a number of appropriate [Page 3] preliminary observations and rulings.[7] She acknowledged that for purposes of summary judgment she would accept as true the opinions of Cole's three experts that Cuprum's rung lock design was defective

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[2] ER6 at 65-66.

[3] *Watkins v. Cuprum International, Inc. and Alamo Iron Works, Inc.*, Brazos County District Court Cause No. 36.987-85 (Texas 1992).

[4] *Domingo Bazan v. Cuprum, S.A. DE C.V., Davidson Ladders, Inc. and Builder's Square, Inc.*, Harris County District Court Cause No. 96-32221 (Texas 1994).

[5] *Jehnsen v. Builder's Square, Inc., Davidson Ladders, Inc. and Cuprum, S.A. DE C.V.*, Bay County Circuit Court Case No. 96-3148-NP-B (Michigan 1996).

[6] ER3 at 5.

[7] The district court adopted the reasoning of the Magistrate with little discussion. ER11 at 121.

and posed a danger to users; she properly assigned no weight to Cuprum's contrary evidence;[8] and she properly framed the issue under Oregon law as turning on whether Cuprum had prior notice of "problems with the Model 534 rung locks."[9] Her error, however, came in applying the law to the facts. She ignored Cole's unrefuted evidence that the prior claims and suits put Cuprum on notice that its ladder posed a danger to consumers. Specifically she ruled:

> "Here, no reasonable jury could find that Cuprum has had notice, or should have had notice, of any defect in the rung lock mechanism of the Model 534 extension ladder."[10]

ARGUMENT

The Magistrate's ruling lacks rationale or legal support. There is not a single state or federal case that supports the assertion that a lawsuit claim alleging [Page 4] a dangerous condition, let alone three, does not operate to impart notice to the named party of the danger alleged. Moreover, by ignoring what Oregon considers valid notice of a danger, the holding improperly intrudes upon Oregon's right to set safety standards to protect her citizens.

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[8] ER9 at 101.

[9] ER9 at 104.

[10] ER9 at 113.

A. The Magistrate's Ruling Has No Support in Under Either Federal or State Law

Under Oregon law, complaints in the form of lawsuits alleging a dangerous condition or design unquestionably places the named defendant on notice of the danger.[11] A jury is not only entitled to hear such evidence, it is authorized to award punitive damages when the defendant fails to act:

> "At trial, plaintiff presented evidence that permitted a jury to conclude, by clear and convincing evidence, that defendants acted with wanton disregard for the health and safety of others.
>
> * * *
>
> "Evidence was presented that defendants actually knew, or should have known, for many years before developing the ATV model that injured plaintiff, that their ATVs were highly likely to cause serious personal injury or death." *Oberg v. Honda Motor Co.*, 320 Or. 544, [Page 5] 553, 888 P.2d 8 (1995).

Although this panel issued an unpublished opinion, by affirming the Magistrate's opinion, this panel gave its stamp of approval to the Magistrate's erroneous holding. This panel's rationale for doing so – that the Magistrate was entitled to apply the federal standard rather then [sic]

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[11] *See, e.g. Oberg v. Honda Motor Co.*, 320 Or. 544, 553, 888 P.2d 8 (1995); *Waddill v Anchor Hocking, Inc.*, 149 Or. App. 464, 468, 944 P.2d 957 (1997); *Lakin v. Senco Products*, 144 Or. App. 52, 61, 62-63, 925 P.2d 107 (1996), *aff'd.*, 329 Or. 62, 987 P.2d 463, (court adopted reasons of lower court for affirming admission of prior acts. *Id.* at 84) *mod. on recons. on unrelated grounds*, 329 Or. 369, 987 P.2d 476 (1999).

the Oregon standard to the quantum of evidence necessary to overcome the moving party's summary judgment motion[12] – cannot justify the error.

First, Oregon's summary judgment standard is not unlike the federal standard.[13] But even if it were not, there is no federal case that supports the novel proposition service of a lawsuit alleging a dangerous condition or design does not operate to impart notice to the named defendant.

Second, contrary to the Magistrate's holding, there is simply no precedent in *any* jurisdiction anywhere – state *or* federal – requiring that notice of a

* * *

[Page 9] **CONCLUSION**

This Court should amend its Memorandum Opinion and reverse its ruling that Plaintiff failed to present the sufficient quantum of evidence to establish a jury issue on punitive damages. In the alternative, this Court should certify to the Oregon Supreme Court the question as to

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[12] Add-4.

[13] "Oregon's summary judgment statute, ORS 18.105 (Oregon Laws, 1975, ch 106, § 1), is patterned after Rule 56 of the Federal Rules of Civil Procedure. However, subsection (d) of Rule 56 was not adopted by the legislature. * * * Therefore, federal cases interpreting those aspects of Rule 56, other than subsection (d) thereof, and decided prior to the enactment of this state's summary judgment statute, are entitled to great weight." *Taylor v. Baker*, 279 Or. 139, 141 n. 2, 566 P.2d 884 (1977).

whether *Oberg*'s "knew or should of known" standard still applies under the amended statute.

Dated this 30th day of October, 2002.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
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No. 02-1190

In The

Supreme Court of the United States

Paul Cole,

Petitioner,

v.

Builders Square and Cuprum, S.A. de C.V.,

Respondent.

On Petition for A Writ of Certiorari to The United States Court of Appeals for The Ninth Circuit

REPLY BRIEF

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INTRODUCTION

Cuprum offers a four-pronged response to Cole's Petition. First, it maintains that Cole did not raise the quantum-of-evidence issue before the Ninth Circuit. Not only did Cole raise the issue, but the Ninth Circuit specifically rejected Cole's position and relied on the federal standard in affirming.

Second, Cuprum contends that the sufficiency of evidence to establish a prima facie case under the Oregon summary judgment rule is no different than that under federal Rule 56. While it is true that when Oregon first enacted its summary judgment rule in 1975, it patterned the rule after the federal version. Since its enactment, however, the Oregon Courts have developed and relied upon their own body of law for the rule's interpretation. Moreover, the Oregon Supreme Court has specifically held that this Court's 1986 "trilogy" of cases, including *Anderson v. Liberty Lobby*, interpreting Rule 56, do not apply to the Oregon rule. The Oregon Court has also made clear that, unlike the federal standard, the substantive burden of proof is not to be considered in determining whether the evidence is sufficient to establish a *prima facie* case.

Third, Cuprum contends that Cole's Petition is not review worthy because it involves nothing more than the Ninth Circuit's misapplication of a *correct* rule of law. Cole's position, however, is that the Court of Appeals applied an *incorrect* rule of law. Instead of applying the federal sufficiency of evidence standard, it should have applied the Oregon standard. This point has already been sufficiently briefed in Cole's Petition and warrants no further response.

Finally, Cupum contends that regardless of the applicable sufficiency of evidence, the facts do not support a punitive damage claim – a point that Cole has also sufficiently covered in his Petition. It, too, warrants no further response.

ARGUMENT

A. Cole Has Properly Raised and Preserved the Quantum-of-Evidence Issue

Cuprum maintains that Cole never raised the quantum of evidence issue before the Ninth Circuit, and that by citing *Anderson v. Liberty Lobby. Inc.*, 477 U.S. 242 (1986), he has asserted "diametrically opposite position[s]." To support this, Cuprum carefully selects certain excerpts from the record, while ignoring others.

Cole properly raised and preserved the quantum of evidence issue in his briefing before the Ninth Circuit. Moreover, only a few days after the Oregon Supreme Court decided *Bolt v. Influence,* 333 Or. 572, 43 P.3d 425 (2002), and well before oral argument, he presented the Ninth Circuit with a Supplemental Memorandum of Authority on this very issue. In it, he stated in part:

> In the briefing, the parties disagree as to the quantum of evidence necessary to defeat a summary judgment motion against a punitive damage claim. Cuprum contends that Cole was required to "submit clear and convincing evidence." Cuprum's Answering Brief at 24. Cole, on the other hand, contends that the submission of evidence supporting an inference of conduct giving rise to punitive damages is sufficient. Cole's Opening Brief at 28; Cole's Reply Brief at 18.
>
> On March 28, 2002, the Oregon Supreme Court in *Bolt v. Influence Inc.* SC, S48510, 2002 Ore. LEXIS 217 (March 28, 2002), held that the "clear and convincing" burden of proof governing the recovering of punitive damages

> does not apply in determining the sufficiency of evidence to defeat a motion for directed verdict:
>
> . . . .

Supplemental Authority, Supp. App.-1A-2A.

Cuprum does not assert that the Supplemental Authority was not timely. Nor can it. The memorandum was filed on April 2, 2002 – only four days after *Bolt* was decided – and only seven weeks after Cole filed his Reply Brief.

More pointedly, in the more than five months between its filing and oral argument,[1] Cuprum never once asserted that it was untimely or that it raised issues not before the Ninth Circuit. In fact, Cuprum neither responded nor objected to Cole's filing.

Cuprum also mischaracterizes Coles' reference to *Anderson v. Liberty Lobby. Inc.* Cole merely cited *Anderson* for the proposition that "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Resp. App.- 3-4. A principle that is consistent with Oregon law. *See, e.g., Jones v. General Motors*, 325 Or. 404, 939 P.2d 608 (1997).

Cuprum also accuses Cole of "embracing" the federal standard in his Petition for Rehearing before the Ninth Circuit. To the contrary, after the Ninth Circuit rejected Cole's position and affirmed on the ground that the federal standard, not the Oregon standard, applied, Cole argued on rehearing that his claim nevertheless met the federal standard:

> This panel's rationale for [affirming] – that the Magistrate was entitled to apply the federal

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[1] Oral argument did not occur until September 9th, 2002, more than five months later.

> standard rather then the Oregon standard to the quantum of evidence necessary to overcome the moving party's summary judgment motion – cannot justify the error.

Petition for Rehearing, Supp. App.-5A.

That Cole made the alternative argument that his claim met the more onerous federal standard, after the Ninth Circuit rejected his contention that the State standard applied, can hardly be considered "embracing" the federal standard, as Cuprum argues.

Finally, the Ninth Circuit itself confirmed that Cole had properly preserved the quantum-of-evidence issue by specifically rejecting Cole's position and relying on the federal standard to affirm:

> Federal law applies to the "question of the quantum of proof necessary to sustain a cause of action." The federal standard requires the court to "view the evidence presented through the prism of the substantive evidentiary burden," which is precisely what the district court did. Because we conclude that the district court properly applied the relevant standard, *we affirm on this issue.*[2]

B. Oregon's Summary Judgment Law Does Not Incorporate *Anderson v. Liberty Lobby's* Evidentiary "Prism"

Cuprum argues that Oregon's summary judgment rule [ORCP 47] mirrors the federal rule as to the quantum of

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[2] *Cole v. Builders Square, Inc.* 48 Fed. Appx. 684 (2002) (footnotes omitted), Pet. App. at 3a-4a (footnotes omitted) (emphasis added).

evidence necessary to establish a prima facie case. Accordingly, under its view, a plaintiff who meets the federal standard also satisfies the state standard. But such is contrary to Oregon caselaw.

Oregon first enacted its summary judgment rule in 1975. The rule was patterned after federal Rule 56. Since its enactment, however, the Oregon courts have developed and relied upon their own body of law for the rule's interpretation.

Importantly, that body of law has not adopted this Court's well-known "trilogy" of decisions interpreting Rule 56,[3] which includes *Anderson v. Liberty Lobby* and its holding that the sufficiency of evidence for a summary judgment motion must be viewed through the "prism" of the substantive burden of proof.[4] *Jones v. General Motors Corp.*, 325 Or. 404, 420, 939 P.2d 608 (1997).

Indeed, in *Jones*, the Oregon Supreme Court expressly rejected any notion that the "three 1986 decisions of the United States Supreme Court . . . interpret[ing] FRCP 56 should influence [the] construction of the 1995 amendment to ORCP 47C[]" just because ORCP 47 was patterned after Rule 56. *Id.* at 416. It emphasized that since the rule's enactment, its interpretation has been based on Oregon law, not federal law:

> The 1986 federal cases on which defendants rely did not exist when Oregon enacted ORS 18.105 (1975) [Oregon's summary judgment rule].

---

[3] The cases comprising the "triology" are: *Matsushita Elec. Ind. Co. v. Zenith Radio*, 475 U.S. 574, (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, (1986); and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

[4] 477 U.S. 242, 248 (1986).

> What did exist when the legislature amended the rule in 1995 was the then-current version of ORCP 47C and a substantial body of case law from this court that had interpreted that rule. In 1995, the legislature amended *Oregon's summary judgment rule, not FRCP 56.*

Id. at 418-19 (emphasis added).

Cuprum nevertheless points to *Onita Pacific Corp. v. Trustees of Bronson*, 122 Or. App. 452, 858 P.2d 453 (1993), a decision from Oregon's lower appellate court. It claims that *Onita* stands for the proposition that Oregon *does* incorporate the "clear and convincing" evidentiary standard in determining the sufficiency of a prima facie claim for punitive damages.

However, the same court that decided *Onita* has since questioned its viability. *See Lakin v. Senco Products, Inc.* 144 Or. App. 52, 925 P.2d 107 (1996), *aff'd.* 329 Or. 62, 987 P.2d 463 (1999). In *Lakin*, the very appellate court that decided *Onita* expressed serious doubts as to whether the sufficiency of evidence to establish a prima facie punitive damage claim should be viewed through a clear and convincing "prism" instead of the "any-evidence" standard. *Lakin v. Senco Products, Inc.* 144 Or. App. at 71 n.16.[5]

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[5] The *Lakin* court stated:

> The parties agree that we should review the "clear and convincing" sufficiency of evidence pertaining to entitlement to punitive damages under the standard expressed in *Onita Pacific Corp.* That is, rather than determining whether there is any evidence to support the verdict, *see, e.g., Brown v. J.C. Penney Co.*, 297 Or. 695, 705, 688 P.2d 811 (1984); *Hall v. Gordon*, 284 Or. 49, 51, 584 P.2d 1374 (1978), we should determine whether there is any evidence from which the jury could have found "wanton disregard" by clear and convincing

The Oregon Supreme Court has since confirmed that the lower appellate court's doubts were well founded by its decision in *Bolt*. *Bolt* established once and for all that the "any-evidence" standard, not the clear and convincing standard, applies when determining whether a party has presented sufficient evidence to establish a *prima facie* punitive damage claim. *Bolt v. Influence,* 333 Or. 579-80

Cuprum suggests *Bolt* should be read narrowly and its application confined to the amendment of pleadings. But even Oregon's Supreme Court refuses to confine *Bolt's* application in this manner. *Woodbury II v. CH2M Hill, Inc.* 335 Or. 154, 61 P.3d 154 (2003) ("This court reviews the denial of a motion for directed verdict for *any evidence* to support the verdict in plaintiff's favor. *See Bolt v. Influence, Inc.*, 333 Or. 572, 577-78, 43 P.3d 425 (2002)" (emphasis added)).

Bolt's holding is clear. In passing on the sufficiency of evidence for a punitive damage claim, court's shall not weigh the evidence through a clear and convincing "prism." The proper standard is the "any evidence" standard. *Bolt v.*

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evidence. We note that *Onita Pacific Corp.* is not necessarily consistent with other authority addressing our standard of review for claims requiring proof by "clear and convincing" evidence. *See, e.g., Faber v. Asplundh Tree Expert Co.*, 106 Or. App. 601, 606, 810 P.2d 384 ("The clear and convincing evidence standard relates to how a jury weighs the evidence, not to how a trial court assesses the capability of the evidence to establish facts."), *rev. den.* 312 Or. 80, 816 P.2d 610 (1991). However, because we conclude that the proof was sufficient under either standard of review to establish plaintiffs' entitlement to punitive damages, we need not resolve which standard is the proper one.

Lakin v. Senco Products, Inc. 144 Or. App. at 71 n

Influence, 333 Or. at 579-80.

Finally, Cuprum suggests that the appropriate standard is "sufficient evidence" rather than "any-evidence." Although both terms have been used to define the standard, they are synonymous in the eyes of the Oregon courts. Cuprum's argument over the semantics of the terms, however, misses the point. The point is that when Oregon courts are asked to determine whether evidence is sufficient to withstand a motion for summary judgment, they properly use the standard applicable to directed verdicts. *Jones v. General Motors Corp.*, 325 Or. 404, 414, 939 P.2d 608 (1997) (quoting *Seeborg v. General Motors Corporation*, 284 Or. 695, 700-01, 588 P.2d 1100 (1978).) And as the Oregon Supreme Court made abundantly clear in *Bolt*, that standard, unlike the federal standard, does *not* view the evidence through a "prism" of the substantive burden of proof.

CONCLUSION

Jury participation has always been an important part of resolving disputes in Oregon. As early as 1854, Oregon's Supreme Court cautioned that, "[w]henever there is any evidence tending to prove a fact within the issue, the jury must pass on it[.]" *Latshaw v. Territory*, 1 Or. 140, 142 (Or. Terr.1854) (emphasis in original). By the 1920s, it had declared the any-evidence standard to be "definitely settled in this state." *Farrin v. State Indus. Acc. Comm.*, 104 Or. 452, 461, 205 P. 984 (1922). In *Bolt* the court reaffirmed that "the jury must be permitted to consider every claim on which the plaintiff has presented *some* evidence tending to establish each element of that claim." *Bolt v. Influence,* 333 Or. at 578 (emphasis original). That principle should not suddenly disappear simply because a defendant removes the case to federal court.

Respectfully Submitted,

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April 2003

SUPPLEMENTAL APPENDIX A

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April 2, 2002

Office of the Clerk
US District Court of Appeals for the Ninth Circuit
95 Seventh Street
San Francisco, California 94119-3939

Re: Supplemental Authority
Cole v. Cuprum.
Ninth Circuit No. 01-35491

Dear Clerk:

Pursuant to Fed. R. App. P 28(j), enclosed please find the following supplemental authority in the above matter.

In the briefing, the parties disagree as to the quantum of evidence necessary to defeat a summary judgment motion against a punitive damage claim. Cuprum contends that Cole was required to "submit clear and convincing evidence." Cuprum's Answering Brief at 24. Cole, on the other hand, contends that the submission of evidence supporting an inference of conduct giving rise to punitive damages is sufficient. Cole's Opening Brief at 28; Cole's Reply Brief at 18.

On March 28, 2002, the Oregon Supreme Court in *Bolt v. Influence Inc.* SC, S48510, 2002 Ore. LEXIS 217(March 28, 2002), held that the "clear and convincing" burden of proof governing the recovering of punitive damages does not apply in determining the sufficiency of evidence to defeat a motion for directed verdict:

> "[T]he 'clear and convincing' burden of proof in ORS 18.537(1), which refers to the ultimate burden of proof that a plaintiff must meet to recover punitive damages, has no relation to the burden associated with the 'directed verdict' standard used to review the sufficiency of evidence on a motion under ORS 18.535(3). A plaintiff satisfies the latter by producing some evidence in support of a *prima facie* case. *Brown*, 306 Or at 602. *See also Wootten*, 286 Or at 135-36 (in deciding whether to submit case to jury, 'we are unconcerned with the quantum of evidence. Our concern is only with the existence of evidence which, if accepted as being true by the trier of fact, would establish [the fact in question].').
>
> "In summary, we conclude that the trial court erred in using a 'clear and convincing' evidentiary standard to review the sufficiency of evidence submitted under ORS 18.535(3) in support of plaintiffs' motion to amend their complaint to request punitive damages. That provision requires a court to deny such a motion only if the evidence submitted is not adequate to overcome an opposing motion for a directed verdict – *i.e.*, only if there is 'no evidence' from which the jury could find the facts necessary to

establish an element of plaintiffs' claim."

For your convenience enclosed is a copy of the opinion.

Thank you for your courtesies.

Very truly yours,

Michael H. Bloom

MHB/sl

enclosure

cc: Timothy O'Neil with enclosure

John Holmes with enclosure

SUPPLEMENTAL APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
No. 01-35491

PAUL COLE,

Plaintiff-Appellant,

v.

BUILDERS SQUARE, INC., a Delaware corporation;
CUPRUM, S.A. de C.V.,

Defendant-Appellee

PETITION FOR REHEARING

Appeal from the Judgment of the United States District Court for the District of Oregon
Honorable Owen M. Panner,
United States District Court Judge

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Of Attorneys for Plaintiff-Appellant
Paul Cole

[Page 4] Although this panel issued an unpublished opinion, by affirming the Magistrate's opinion, this panel gave its stamp of approval to the Magistrate's erroneous holding. This panel's rationale for doing so – that the Magistrate was [Page 5] entitled to apply the federal standard rather then the Oregon standard to the quantum of evidence necessary to overcome the moving party's summary judgment motion[1] – cannot justify the error.

* * *

[Page 6] If federal law were to trump Oregon law in this manner, then it would be more than simply applying federal over state procedure, it would be a trespass upon Oregon's core *substantive* right to regulate the standard of care that manufacturers must exercise when selling products within her boundaries.

Absent federal preemption, Oregon's right to determine when a manufacturer is on notice that its conduct is unacceptable and gives rise to a duty to act, remains unequivocal and inviolate.

Dated this 30th day of October, 2002.

Respectfully Submitted,

BLOOM & SCHUCKMAN, P.C.

By: /s/ Michael H. Bloom
Michael H. Bloom, OSB No.81510
Of Attorneys for Plaintiff Paul Cole

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[1] Add-4.